TO

THE RIGHT HONOURABLE

SIR CHARLES ABBOTT,

Lord Chief Justice of England,

&c. &c. &c.

THIS WORK IS DEDICATED,

WITH

THE HIGHEST RESPECT

FOR THOSE GREAT LEGAL TALENTS

AND

THAT ENLIGHTENED JUDGMENT

WHICH SO EMINENTLY DISTINGUISHED HIM

AS

AN ADVOCATE

AND

ULTIMATELY RAISED HIM

TO

THE HIGH JUDICIAL SITUATION

HE NOW FILLS,

WITH NO LESS HONOUR TO HIMSELF

THAN

BENEFIT TO THE COMMUNITY.

PREFACE.

IN submitting this Treatise to the Public, it may not be improper to prefix a short prospectus, or analytical view of its contents, by which the reader will be enabled to judge how far the subject proposed to be considered may be worthy of his attention.

Upon the law of real property, and upon most other legal subjects, there are already before the public several very able Treatises and Digests, but it is matter of surprise that there is no work upon an extended scale relating to the laws of *Commerce, Manufactures,* and *Contracts.* The older books and abridgments are exceedingly deficient upon these subjects; and though there are many useful modern Treatises on some detached parts, there is no work affording a comprehensive view of the whole; and yet the subject is peculiarly *interesting*, and of the greatest *practical* importance. It is *interesting* to trace the springs of our resources, the channels through which they flow, and the distribution by which they are made to invigorate and refresh the state in all its departments and relations. When we compare the geographical extent of Great Britain, with that of most of the European States; and when we reflect on the recent events on the Continent, when Great Britain was enabled to contend with effect against a power, by which almost all other nations were successively reduced to subjection; it cannot but occur to our minds, that the

constitution and the municipal regulations of this country must possess some inherent and paramount advantages, enabling us to avert the misfortunes which overwhelmed the rest of Europe. Of these advantages our *Commercial Constitution* appears to comprehend a very considerable proportion. Providence has indeed bestowed upon Great Britain a proud security against foreign encroachments in the virtues of her national character. But this character with all its firmness would scarcely have supported her under the unexampled pressure of recent events, without those resources of private wealth and national defence, which she has been enabled to derive from her *Commerce*, as regulated by the judicious policy of her legislature. In a *practical* point of view also, it is equally important to the statesman, the lawyer, and the merchant, to be well acquainted with the national and municipal, public and private regulations affecting *Commerce* and *Manufactures*; to the *statesman*, as enabling him to suggest improvements, to extend the export and the import, and the domestic trade, and to increase the revenue of the country; to the *lawyer*, as enabling him to understand and apply to cases as they may arise the different provisions of the commercial code; and to the *merchant*, as enabling him to ascertain the advantages or disadvantages resulting from particular branches of commerce, and to avoid those risks and forfeitures which are so frequently incurred by the violation of many commercial regulations. Impressed with these considerations, I have resolved to offer to the public, the result of my professional labours on these interesting topics.

The subject is divided into *two* parts; the *first* relates principally to those *public* regulations, inter-national as well as municipal, which affect foreign and domestic commerce and manufactures in general, and in particular those of

Great Britain; and the *second* comprehends a view of the law as it more immediately affects the transactions in trade and commerce between *private individuals.* And in order to render the work more complete, a volume is added containing all the principal treaties, statutes, documents, instruments, and securities, that may be found useful to resort to, examine, or adopt in commercial affairs.

The *present* volume commences with introductory observations, comprehending a general view of those principles in political economy upon which, with views more or less comprehensive, the legislators of almost all countries have proceeded in the prosecution or regulation of trade, whether foreign or domestic. In this place are shortly considered the effects of commerce upon population, and its consequent importance, the natural order and progress of its growth in all communities, and the specific descriptions of traffic which in general, or under peculiar circumstances, have been deemed the most advantageous to a state, as well as to the individuals pursuing it. The adoption by the British law of the doctrines laid down in the best treatises on these subjects, will be found traced and illustrated. This concise enquiry into the principles and reasons upon which the commercial regulations have proceeded, is best calculated to lead to the due understanding and construction of them; and the theoretical questions necessary to the clear apprehension of the subject having been thus disposed of, the way will be prepared for the consideration of those direct provisions which form the matter of the subsequent chapters.

After these preliminary enquiries, we are naturally led, in taking a comprehensive and practical view of the principles and rules of the whole Commercial Law, FIRST, to enquire how the commerce of any country, and of our own

in particular, may be legally affected by acts of *foreign* states, in time of peace or war: SECONDLY, how the commerce of our own country is *publicly* affected by her own municipal regulations: THIRDLY, how such commerce is affected by those regulations which relate merely to the *private interests* of trade: FOURTHLY, the instruments and securities employed to facilitate commerce; and FIFTHLY, the remedies for the infraction of commercial rights. Following this arrangement of the subject, the *Second* Chapter contains those laws by which *nations* are regulated in their commerce with each other. This law of nations, as connected with commerce, comprehends the principles of national independence—the intercourse of nations in peace—the privileges of ambassadors, consuls, and inferior officers—the commerce of the subjects of each state with those of the others—the grounds of just war, and the modes of conducting it—the mutual duties of belligerent and neutral powers—the limit of lawful hostility—the rights of conquest—the faith to be observed in warfare—the force of an armistice, of safe-conduct, and passports—the nature and obligation of alliances—the means of negociation, and the authority and interpretation of treaties. These, and many other important subjects, forming a complete practical system of the law of nations, and obviously most materially affecting commerce, are first considered. The three divisions of the law of nations, into the voluntary, the customary, and the conventional law, are fully considered, as they regulate commerce, and in particular the latter, as it affects the construction of commercial treaties.

The importance of the office of *consul*, in commercial affairs, is so considerable, that the whole of the *third* chapter is occupied in considering his appointment, qualifications, duties, privileges, protection, and remuneration.

In the *fourth* Chapter, the *freedom of trade* is considered, the illegality of restrictions on the commerce of independent states, the right of a nation to limit her own commerce, and consequences of infraction; the right to refuse free passage by land or water, or limit the same, and of the dominion of the seas; the British Seas and consequent rights, and the modification of these several rights and duties of nations by particular treaties.

In the *fifth, sixth,* and *seventh* chapters, as branches of the before-mentioned right of a nation to limit her own commerce, are very fully considered, the law of this country respecting the residence and commerce of *Aliens, Denizens,* and *Naturalization;* the *Navigation Laws* of Great Britain, as they affect the Coasting trade; the European trade; the Asiatic, African, and American trade; the Colonial and Plantation trade, and British Shipping; and the whole of the very important laws relating to the *British Fisheries.*

The Mercantile Law of Nations, in time of *peace*, having thus been amply treated of, the *eighth* chapter proceeds to explain the spirit and effect of *War, as it affects the commerce of belligerents.* The illegality of commercial intercourse between the belligerents themselves; the consequent invalidity of all insurances, and other contracts by which such intercourse may be encouraged or protected; and the consequences of hostile embargoes and capture, and what property is liable to be taken, and the other branches of law connected with the subject, are fully considered; and the invaluable decisions of Sir W. Scott upon these subjects will be found extracted and arranged.

From the effect of war upon the commerce of the belligerents themselves, the most natural transition is to its effect upon the commerce of *Neutrals*; and accordingly this

constitutes the subject of the *ninth* chapter. Here are considered, *first*, the general rights and immunities of neutral commerce, and the exceptions to those rights and immunities. These exceptions will be found viewed in two classes; first, the instances where some limitations are necessarily imposed, even upon the neutral who preserves his character of neutrality; and, secondly, the instances where the property of the neutral is forfeited by his misconduct in violating that character. Under the former head fall the cases of pre-emption, embargo, stoppage, and prohibition in general. Under the latter will be included, first, the open violations of neutrality, by contraband trade, by infraction of blockade, or by the prosecution, during war, of a commerce not permitted during peace; and, secondly, the secret violations of neutrality by collusive agreements with the enemy, and other frauds of whatsoever description. These statements are followed by an explanation of the duties which are owing to neutrals from those belligerents, in whose favour such open or secret violations have taken place. Some observations are subjoined on the claims of visitation and search, as connected with the rights of seizure; and this division of the subject will conclude with a view of the spirit in which the foregoing rights and provisions have been acknowledged, construed, and enforced, by the municipal law of Great Britain.

In the *tenth* chapter are considered the dispensations with the legal effect of war upon the commerce of belligerents and neutrals, by means of the King's proclamation, passports and safe-conducts, licences, orders in council, and temporary statutes; and in particular the decisions relative to licences will be found collected.

Having thus examined the modes by which the commerce of a country may be affected by the acts of *foreign* states,

whether in time of peace or war, in the *eleventh* chapter the modes by which the commerce of *Great Britain in particular* is publicly affected by her own municipal regulations are considered; and in particular the general policy and regulations of this country with respect to *foreign* trade. The different *restraints* and *encouragements* of *importation* and *exportation*, to or from the United Kingdom; the *restraints* by express prohibitions, or by the imposition of high duties, and the *encouragements* of *importation* by bounties, by reduction of duties, by the bonding and warehousing system, and by the establishment of the various docks and the regulations affecting them; and the *encouragements* of *exportation* by bounties and drawbacks. Then are considered the encouragements and facilities to the foreign commerce of this country by *commercial treaties* in general, and in particular by the treaties between this country and France, Spain, Portugal, Russia, Sweden, the Netherlands, Sicily, the Ionian Islands, and America.

In the *twelfth* chapter, the remaining encouragements afforded to the foreign commerce of Great Britain, and derived from her *colonies* and *settlements* abroad, and from the establishment of the principal foreign *commercial companies* and societies, are considered. The utility and practical effect of the colonial trade, and of the establishment of exclusive companies, are examined. The laws respecting trade in the colonies, plantations, and islands of Great Britain are pointed out, together with the redress for crimes and injuries committed there. A concise account is also given of the East India Company and trade to the East Indies, the West India trade, the Hudson's Bay Company, the South Sea Company, the African Company, the Sierra Leone Company, the Russia Company, and the Turkey Company.

The *thirteenth* chapter, which concludes the present volume, relates to the principal charges imposed on trade by the *Customs* and duties of *Excise*. These are defined, and the relative advantages of each are concisely considered. A practical view of the law of *Customs* is then given in the following order: FIRST, The history of the customs, and the modes by which they were anciently levied. SECONDLY, the modern consolidation acts, and the mode in which this part of the revenue is now collected, (and herein, 1st, of the duties on importation; 2d, on exportation; 3d, on goods carried coastwise; 4th, the tonnage duties; 5th, the south-sea duties; 6th, the quarantine duties; 7th, the tonnage duties; 8th, the countervailing duties charged on the trade between Great Britain and Ireland.) THIRDLY, the regulations prescribed by law to secure the payment of these duties, (and herein, 1st, of the ports and places at which a vessel may lawfully receive or discharge her cargo; 2d, the time assigned for the discharge or loading; 3d, the manifest; 4th, the master's report, and the merchant's entry—the valuation of the goods—the bill of sight—the allowances for tare, damage, &c.; 5th, the cocket or clearance; 6th, the warrant for landing or shipping goods, and the presence of the officer; and 7th, the regulations on carrying goods coastwise.) FOURTHLY, the penalties and forfeitures consequent on trading in prohibited and uncustomed goods, or non-observance of the foregoing regulations—the powers of searching for and seizing such goods—the method of procuring restoration thereof—and the immunities and protections afforded to the officers of customs and excise, and the liabilities which they incur. This chapter concludes with a concise statement of the enactments, regulations, and decisions relative to the *duties of Excise*, under *three* heads, viz. *First*, the provisions connected with the principal articles subject to duties, arranged in alphabetical order. *Secondly*, those provisions of a general nature which

relate to licences, entries, permits, &c.; and *Thirdly*, the modes of recovering the duties, and the penalties and forfeitures incurred by the non-payment of them, or the non-observance of the regulations for securing such payment.

The *second* volume relates to the other *public* and *general* regulations which affect the foreign as well as inland Commerce and the Manufactures of Great Britain.

With respect to *foreign* trade, the commercial law is considered, as it relates to Quarantine—Lighthouses, Beacons, and Sea Marks—Pilots—Ports, Havens, Roads, Harbours—Port Duties and Tolls—Ballast—Convoys—Wreck and Jetsam—Pirates and Sea Rovers.

With respect to *inland* trade, are considered the laws relating to Canals, Roads, Railways, and Tolls incident thereto—Markets and Fairs, Tolls and Sales in Market overt—Hawkers and Pedlars—Weights and Measures—Money—the *encouragement* of particular branches of trade, as new discoveries by grants of patents, and exclusive privileges to companies and corporations; the bye laws of the latter; the *prevention of injuries* to trade by the laws relating to forestalling, regrating, engrossing, monopolies, false rumours and conspiracies.

The *King's Prerogative* in regulating or affecting trade is then fully considered, as well in its relations to foreign as to domestic commerce.

This volume then concludes with a copious arrangement of the enactments, regulations, and decisions respecting the

MANUFACTURES of this kingdom; an undertaking which it is hoped will be found no less interesting and useful than it is novel.

The *third* volume relates to those municipal regulations which principally affect the *private* interests of trade, and here are considered *mercantile contracts in general*, the several leading distinctions between simple contracts verbal or written; deeds, and contracts of record, with the respective advantages peculiar to each form of contract under particular circumstances of commercial intercourse; the *capacity* of the contracting parties; the *sufficiency* of the *consideration*; and the *legality* of the matter stipulated to be performed; the *forms* of the contract, and when it must be *in writing*, under the provisions of the statute against frauds, and the other requisites, with a Digest of the *stamp* acts and decisions as they affect mercantile instruments; and how a contract is to be construed, and may be performed, avoided, or determined.

Then follow the important laws respecting the persons engaged in commerce, as *partners*, *apprentices*, *principals* and *agents*, *factors* and *brokers*, *masters* and *servants*, and the rights and liabilities of each.

The principal contracts relating to commerce, as those of manufacture, sale, (and incidentally the right of stoppage *in transitu*) exchange, warranties, hiring and loans, are then separately considered.

The law of *Bailees* is then stated, in its relation to bankers and other persons concerned in various branches of commerce, as manufacturers, packers, warehousemen, wharfingers, and carriers by land and water; and the right of *lien* incident thereto.

Then follows the consideration of the *securities* for the due performance of mercantile contracts, as bills of exchange and promissory notes, bankers notes and checks on bankers, bonds, warrants of attorney, statutes staple, statutes merchant, mercantile guarantees, charter-parties, and bills of lading.

The law of *shipping*, as it affects the owners, captain, seamen, passengers, and merchant, and the relative rights, duties, and liability of each, forms the subject of particular enquiry.

Then follows a digest of every enactment and decision on the *insurance* law, as well as it affects ships, and goods on board thereof, as warehouses and buildings, and property therein.

Having thus considered all the rights, duties, and liabilities incident to commerce, the *remedies* for the infraction of the commercial law of nations, and for the non-performance of contracts, either in case of solvency or insolvency, are then examined. The redress for the violation of safe-conducts; infringement of rights of ambassadors and consuls; piracy, and illegal capture; and the course of proceedings in the courts of admiralty, are pointed out.

The cases in which a specific performance of a contract may be enforced, or the breach of it prevented by a court of law or equity, are examined; and when it is preferable to resort to the latter court, and when securities unduly obtained will be directed by that court to be cancelled. The modes of obtaining satisfaction or compensation in damages, either stipulated or to be assessed, by set-off and mutual credit, by arbitration or by action; and the redress to be obtained under composition deeds, deeds of inspection, letters

of licence, and under the Bankrupt Laws and the Insolvent and Lords' Acts, are subjects fully considered, and conclude this volume.

In the last volume, or *Appendix*, will be found a comprehensive collection of the principal *treaties*, *statutes*, *public documents*, and *proceedings*, relating to commerce and trade, and of approved modern forms of contracts, agreements, bonds, indentures, securities, and documents of every description, calculated either to elucidate the subject of the foregoing volumes to the profession, or to be of practical utility to merchants, planters, traders, notaries, and others, in their conduct and management of commercial affairs.

A table of contents, and of the names of the decisions referred to, are prefixed to each volume, which also contains a full index of the matters comprised therein; and, therefore, each part of the work will be found complete in itself, without reference to the other volumes. In this arduous and laborious undertaking I have received very valuable assistance from my industrious pupils Mr. Robert Tyrwhitt and Mr. T. W. Tyndale; and I am greatly indebted to my friend Mr. David Hughes for the advantages derived from his research and accurate observations on many parts of the subject. I fear, that notwithstanding the great care observed in endeavouring to render the work accurate, the variety of the subjects, and the interruptions incident to professional engagements, may have occasioned some errors; for which, however, I hope the candour of the reader will make allowance.

Temple,
1st Jan. 1820.

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COMMERCIAL LAW.



CHAP. I.

Introductory Observations on the Advantages resulting from Commerce and its particular Branches, and the Regulations affecting it.

Of the advantages resulting from commerce in its stimulus to improve agriculture and fisheries, and consequent support and increase of population.

IT is an acknowledged principle in political economy, that the great object of all rational politics is to produce the greatest quantity of happiness in a given tract of country;—that this is to be effected by increasing the number of percipients, provided they be comfortably supported;—and that the way to increase such number usefully and permanently, is to increase the effective demand for labour, which stimulates the improvement of agriculture and other sources of subsistence;—and that consequently it is the duty of every legislator to adopt measures conducive to this end (1). It follows that *commerce*, and the regulations which affect it, are valuable or injurious exactly in the degree in which they promote or retard this great object.

It is obvious that the increase of population must be effected principally by the encouragement of agriculture and fisheries, which afford the provision for its support (2). But the encourage-

(1) 2 Malthus, 433. 2 Smith, 200. 2 Paley, Mor. Phil. 345. Sir J. Child on Trade, 167, 8. Tucker on Trade and Naturalization, part 2. sect. 4. 7, 8, &c.

(2) 1 Malthus, 272. 2 Malthus,

ment of agriculture can take place only by an increase of those *equivalents* which may be given to the owners of the soil in exchange for its produce (1); for the soil of any tract of land will yield, with due cultivation, a much greater quantity of produce than can be necessary for the support of the owner, and of the labourers and servants whom he employs; and therefore, if there were no equivalent that could be given to him for his superfluity, if there were nothing which he wanted and others had to spare, he would cease to produce that superfluity at all. He would bring into cultivation only so much land as would satisfy the immediate wants of his family and dependants, and leave the rest in vast forests for the chase, or unproductive commons for the cattle of his villagers (2). He would not part with the land, because that would diminish his power and importance; he would live as our ancestors appear to have done in the feudal times (3). But when, by the introduction of manufactures and commerce, the less opulent classes of society begin to prepare and to offer for sale something of their own which is useful or ornamental, and to seek a profit by circulating in one district of the state the natural produce peculiar to another, the desire of possessing these new or remote conveniences or luxuries becomes a motive with each proprietor of the land to enlarge its cultivation, and by the consequently extended distribution of the earth's produce, population receives a fresh impulse (4). This impulse having once been originated, continues, under any circumstances of tolerable security, to operate with gradual but unwearied force upon the uncultivated land as long as there remains a want, natural or artificial, which domestic skill and industry can gratify (5). The manufacturing and commercial classes still bring into market either goods, or

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137. See Ld. Somers Tracts, vol. 12. p. 73. Colquhoun on Wealth, &c. of British Empire, 15. 3 Adolphus, Polit. Stat. British Empire, 277 to 280, for some judicious observations on improvement of fisheries.

(1) Id. ibid. 2 Paley, 368. 370. 3 Hume, 403. 2 Smith, 104.

(2) 2 Paley, 368. 370, 1. 374, 5. 2 Smith, 104. 3 Hume, 403. Anderson's Hist. Com. vol. 1. Preface, and id. Introd. p. 42. Aristot. Politics, b. 1. c. 6.

(3) This opinion is elucidated by Sir J. Child on Trade, Preface, and by the passage in 2 Smith's Wealth of Nations, 158, &c.

(4) 3 Hume, 403. 2 Paley, 368. 372. 2 Smith, 104. Tucker on Trade, Introduction, p. 6. Sir J. Child on Trade and its Influence on Population, 2d part, 29, 30. 35.

(5) Hence it is clear that increase of commerce enhances the value of land. See Sir J. Child's Discourse on Trade, Preface

the money by which goods are represented, and the agricultural classes still continue to purchase those goods, or that money, by an increase of the produce of the earth. And all orders of the state, thus mutually enriching themselves, and thus equally contributing to augment the funds for the maintenance of the labourer, become more and more able to support the expences attendant on an increase of population.

Utility of foreign commerce.

But as every climate is limited to certain natural productions, and every community to particular manufactures, beyond which its skill does not extend, the quantity of conveniences or luxuries which the commercial classes of each country could furnish to the proprietors of land from native resources alone, would be too small to encourage the cultivation of the soil in a degree sufficient for the maintenance of a large population. It has therefore been found convenient by almost every state to encourage the intercourse of its own inhabitants with those of foreign countries; where new productions may be gathered from the earth, and new arts acquired from the people (1). The tin and the wool of Great Britain, when completely distributed by internal commerce to all the districts of the kingdom which require them in their raw state, and worked up into manufactures for the complete supply of all the British individuals with whom an effective demand exists, would, after the attainment of these immediate objects, become merely useless without foreign commerce. The agricultural classes, having no need of such commodities, would not enlarge their own labour to procure them: the increase therefore in the produce of the earth would pause, and the progress of population must necessarily be impeded for want of a commensurate augmentation in the means of subsistence. But here the impulse of foreign commerce arises, and applies its force to the career of improvement. The tin or the wool of Great Britain is carried to other countries: and their cotton and tobacco, for which a demand exists at home, are brought hither in return. The necessity for these is

"There is an inseparable affinity in all nations and at all times between land and trade, which are twins, and have always and ever will wax and wane together. It cannot be ill with trade but land will fall, nor ill with lands but trade will feel it." See also Tucker on Trade, Introduction, 10 to 12. and Anderson's Hist. Com. vol. 1. Introduction, p. 42.

(1) 2 Paley, 373, 4, 5. 2 Smith, 119. Tucker on Trade, Introduction, 2.

a spur to agricultural industry; the treasures of the earth are now called forth in greater abundance; and the increase of food and of population gradually proceeds, and will proceed until the means of creating and gratifying new wants, or the possibility of increasing the produce of the soil, shall cease and be totally exhausted.

The increase of demand for labour and employment are the best encouragements to increase of population.

From these considerations this general principle may be deduced, that the way to increase the population of a country usefully and permanently, is to increase the effective demand for labour (1). Whether it be the labour of the husbandman, who is employed by the occupier of the land to till and reap it; or the labour of the manufacturer, who works up the raw productions of nature; or the labour of the merchant, who conveys from one part of the kingdom to another, or circulates to and fro between distant kingdoms the natural or artificial commodities peculiar to each; or under whatever denomination the labour may fall, as long as it be wanted and amply paid for, that is to say, as long as the demand for it be really an effective demand, so long will the increase of employment be valuable alike to the individual who supplies it, and to the community which rewards it; so long it will increase the general power to purchase, and thus encourage agriculture to provide for the subsistence of a still increasing population. It should therefore be the aim of every state, in promoting the increase of its population, to enlarge as far as possible the quantity of that employment for which the people in general will be willing to pay. (2)

Interference of legislature how far advisable.

It has however been laid down, by some of the most eminent writers on political economy (3), that this is not to be effected by positive institutions, and that every active interference of the legislature with its subjects, by prohibiting or restraining any particular branch of honest labour, or by encouraging any particular branch at the expence of the others, whether in agriculture or in commerce, has uniformly retarded the advances of public opulence; and that the sound policy of a legislator is not to

(1) 2 Paley, 367. 2 Smith, 200.
(2) 2 Paley, 345, 6. 2 Malthus, 433. 2 Smith, 200.
(3) 2 Smith, 118, 9. 125. 201. 204, 5. 3 Smith, 183. 2 Malthus, 196. 2 Paley, 400. 402. 3 Hume, 403. Sir J. Child on Trade, 2d part, pp. 46, 7. 81. 86. 132, 3.; and Buchanan's Observations on Smith's Wealth of Nat: 2d ed. vol. 4. pp. 156, 7.—Id. Introduction, 3.

impose restrictions or regulations upon domestic industry, but rather to prevent them from being imposed by the contrivance or folly of others (1). Upon this point the opinions of those celebrated writers, Smith, Hume, Paley, and Malthus, are uniform. Dr. Adam Smith (2) observes, that "every individual is continually exerting himself to find out the most advantageous employment: it is his own advantage indeed, and not that of society, which he has in view; but the study of his own advantage naturally, or rather necessarily, leads him to prefer that employment which, under existing circumstances, is most advantageous to the community (3). What is the species of domestic industry which his capital can employ, and of which the produce is likely to be of the greatest value, every individual, it is evident, can in his local situation judge much better than any statesman or lawgiver can do for him. The statesman who should attempt to direct private people in what manner they ought to employ their capitals, would not only load himself with a most unnecessary attention, but assume an authority which could be safely entrusted, not only to no single person, but to no council or senate whatever; and which would no where be so dangerous as in the hands of a man who had folly and presumption enough to fancy himself fit to exercise it." Hume (4) observes, that all limitations and methods of supporting populousness and increasing manufactures, except by the interests of proprietors, are violent and ineffectual. And Dr. Paley observes, that from those regulations of law relating to commerce, to plenty, to riches, and to the number of people, more is expected than laws can do: that the natural basis of trade is the rivalship of quality and price, or, which is the same thing, of skill and industry; and that every attempt to force trade by operation of law, is sure to be either eluded by the quicksightedness and incessant activity of private interest, or to be frustrated by retaliation; and that *perhaps* the only way in which the interposition of law is salutary in trade, is in the *prevention* of frauds.

(1) Id. ibid. See some valuable suggestions as to the policy of the legislature on the subject of trade, Sir J. Child, 154 to 164.

(2) 2 Smith, 201. 204, 5.

(3) See also Tucker on Trade, Introd. 7. where it is laid down, that the private interest of merchants for the most part coincides with the general interest of their country. And again: "There is a great similitude between the affairs of a private person, and of a nation; the former being but a little family, and the latter a great family." Sir J. Child, 149.

(4) 3 Hume Hist. 403.

Malthus, who was an advocate, under the then existing circumstances, for legislative interference in favor of agriculture, regrets that a system of general liberty, with regard to commerce, does not exist; and that the restraints and encouragements of peculiar branches of it should give occasion for the interference which he proposes. (1)

But it has been admitted by the same authors, that some exceptions must be allowed to this rule; and that, for instance, the provisions of the navigation acts, which will hereafter be fully considered, though crowded with prohibitions and encouragements which diminish our profit, have always been held politic, because, by excluding foreigners from participation in certain parts of our trade, and providing a nursery for our seamen, they materially contribute to the national defence (2); and it has been doubted by other authors whether the doctrine that government ought to interfere as little as possible in trade and commerce is well founded (3). It must be admitted that, with reference to foreign commerce in particular, the legislature or the government in which they repose confidence, may be aware of circumstances not within the knowledge of private individuals, who attend only to their own particular interests; and which may enable such legislature to foresee that prejudicial consequences will ensue to the community, if some, at least temporary, restrictions, regulations, or encouragements of a particular branch of commerce, be not introduced. And therefore, though in general bounties and drawbacks may be inexpedient, yet exceptions have been admitted, even by those authors who most strenuously insist that no legislative interference is advisable. Thus Dr. Adam Smith allows that the encouragement of fisheries is a national benefit, and therefore their extension may in general be an object for bounties and encouragement at the expence of the public (4). So it is advisable for the legislature, as in the case of patents, to give exclusive privileges to the first inventor of a manufacture, in order the more effectually to encourage the productions of genius: and many regulations affecting commerce have been

(1) 2 Malthus, 195, 6.

(2) 2 Smith, 214, 215. Sir J. Child on Trade, Preface, and chap. 4. page 9. Ld. Sheffield's Strictures on Navigation System. 3 Adolphus, 163.

(3) See 3 Adolphus, 277, 8. Sir J. Child in his celebrated Treatise on Trade, 49.

(4) 2 Smith, 279. 3 Adolphus, 277.

introduced, either with a view to revenue, or to prevent the impositions and frauds which the cupidity of ill-designing persons might induce them to practice (1). So in a country like England, where the want of subordination in the lower class of people is attended with pernicious consequences, both in a commercial and a moral view, laws are necessary to prevent combinations for the increase of wages, or to destroy implements of trade. (2)

However, these are exceptions justifiable only in particular cases, and do not affect the general principle that the legislature should be cautious in interfering to regulate the employment of the capital of any individual: for where there is a free competition, the labour and the capital of every person will in general be employed by him in the channel most conducive to his own ultimate interest. Of that interest each one is himself, from a thousand circumstances, the best possible judge; and the interests of the whole community must be most effectually ensured, when that of each individual is most judiciously consulted. (3)

How a capital best directed for benefit of state and individuals.

It is now necessary concisely to consider what directions of capital generally set the largest quantity of employment in motion, and are consequently most beneficial to the state; and we will then endeavour to show how it happens that the largest quantity of employment in every particular case is set in motion by that direction of capital, which, under the peculiar circumstances of that case, is the most profitable to the owner. A capital may be employed in four different ways (4); *first*, in raising raw produce for the supply of the society; *secondly*, in preparing or manufacturing that produce for immediate use; *thirdly*, in transporting the raw or the manufactured produce from the places where they abound to those where they are wanted; and, *lastly*, in retailing produce by small quantities for immediate consumption. In the *first* mode are employed the capitals of all those who undertake the improvement or cul-

(1) See observations in Sir J. Child on Trade, Preface; and Tucker on Trade, Introd. 7, 8. And see further as to the effect of laws on the commercial habits of the people, Sir J. Child on Trade, 28. 2d part.

(2) Tucker on Trade, 36, 37.

(3) 2 Paley, 376. 2 Smith, 204. ante, 4, 5.

(4) 2 Smith, 103.

tivation of lands, mines, or fisheries; in the *second*, those of all master manufacturers; in the *third*, those of all wholesale merchants; and, in the *fourth*, those of all retailers. The three last of these occupations are useful in proportion as they promote the first, which is the increase of the earth's produce; and this they effect, as we have before observed, by enabling increased multitudes of labourers to pay for such additional productions (1). With equal profit the direction of capital most advantageous to the state, after agriculture, is the establishment of manufactures; inasmuch as manufactures employ and pay a greater number of individuals than retail trade or even wholesale commerce. For the same reason wholesale commerce is preferable to retail trade. The retailer does not provide profitable employment to any but himself, or even if his business be on the largest scale, to any but the servants in his shop; whereas the wholesale merchant employs not only the clerks, porters, and other labourers about his premises, but also the broker and the wharfinger, and intermediately the sailors and carriers who transport his goods between one place and another.

The several subdivisions of capital also which occur in the class of wholesale commerce, are with equal profits extremely various in their comparative utility. These subdivisions are threefold; the *home* trade, the *foreign* trade of consumption, and the *carrying* trade (2). The *home* trade is the purchase of domestic commodities in one district of our own country to be sold in another of its districts; this comprehends both the inland and the coasting trade. The *foreign* trade of consumption is the importation of foreign goods for domestic consumption, or the exportation of domestic goods for foreign consumption. The *carrying* trade is the conveying the surplus produce of one foreign country to another. The comparative benefits of these three trades have been so clearly explained by Dr. Adam Smith, that it would be impossible to state them in any words so advantageously as his own. He says, (3)

"The capital which is employed in purchasing in one part of the country in order to sell in another the produce of the industry in that country, generally replaces by every such operation two

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(1) 2 Smith, 104. 3 Adolphus, Polit. Stat. British Empire, 141.

(2) 2 Smith, 113.

(3) 2 Smith, 113—117.

distinct capitals, that had both been employed in the agriculture or manufactures of that country, and thereby enables them to continue that employment. When it sends out from the residence of the merchant a certain value of commodities, it generally brings back in return at least an equal value in other commodities. When both are the produce of domestic industry, it necessarily replaces by every such operation two distinct capitals, which had both been employed in supporting productive labour, and thereby enables them to continue that support. The capital which sends Scotch manufactures to London and brings back English corn and manufactures to Edinburgh, necessarily replaces by every such operation two British capitals which had both been employed in the agriculture or manufactures of Great Britain. The capital employed in purchasing foreign goods for home consumption, when the purchase is made with the produce of domestic industry, replaces too, by every such operation, two distinct capitals, but one of them only is employed in supporting domestic industry. The capital which sends British goods to Portugal and brings back Portuguese goods to Great Britain, replaces by every such operation only one British capital, the other is a Portuguese one. Though the returns, therefore, of foreign trade of consumption should be as quick as those of the home trade, the capital employed in it will give but one half the encouragement to the industry or productive labour of the country. But the returns of the *foreign* trade of consumption are very seldom so quick as those of the *home* trade. The returns of the home trade generally come in before the end of the year, and sometimes three or four times in the year: the returns of the foreign trade of consumption seldom come in before the end of the year, and sometimes not till after two or three years. A capital therefore employed in the home trade will sometimes make twelve operations, or be sent out and returned twelve times, before a capital employed in the foreign trade of consumption has made one. If the capitals are equal therefore, the one will give four and twenty times more encouragement and support to the industry of the country than the other. The foreign goods for home consumption may sometimes be purchased, not with the produce of domestic industry, but with some other foreign goods; these last, however, must have been purchased either immediately with the produce of domestic industry or with something else that had been purchased with it; for, the case of war and conquest excepted, foreign goods can never be acquired

but in exchange for something that had been produced at home, either immediately or after two or more different exchanges. The effects therefore of a capital employed in such a circuitous foreign trade consumption, are in every respect the same as those of one employed in the most direct trade of the same kind, except that the final returns are likely to be still more distant, as they must depend upon the returns of two or three distinct foreign trades. The whole capital employed therefore in such a roundabout foreign trade of consumption, will generally give less encouragement and support to the productive labour of the country, than an equal capital employed in a more direct trade of the same kind. That part of the capital of any country which is employed in the carrying trade, is altogether withdrawn from supporting the productive labour of that particular country, to support that of some foreign countries; though it may replace by every operation two distinct capitals, yet neither of them belongs to that particular country. The capital of the Dutch merchant which carries the corn of Poland to Portugal, and brings back the fruits and wines of Portugal to Poland, replaces by every such operation two capitals, neither of which had been employed in supporting the productive labour of Holland, but one of them in upporting that of Poland and the other that of Portugal; the profits only return regularly to Holland, and constitute the whole addition which this trade necessarily makes to the annual produce of the land and labour of that country."

It has been well observed (1), that many reasons may be assigned for the prevailing error, by which persons speculating on the nature of commerce are induced to consider foreign as of far superior importance to home trade. The illusions created by theories drawn from the balance of commerce — the desire to render profit more acceptable by representing it as gained at the expence of some political opponent — and, above all, the inclination prevalent in the human mind to estimate most highly that which seems to be produced with the greatest labour and risque; and to undervalue the acquisitions which are copious, constant, and silent, when compared with those which present to the mind ideas of enterprise, danger, and achievement: all these motives concur, with many others, in giving rise to calculations so erroneous. That the foreign trade of Great Britain

(1) 3 Adolphus, Polit. Stat. British Empire, 232.

is attended with immense advantages, cannot be doubted; and that portion of it which arises from colonies is also of the highest value: but these together cannot be put in competition of the home trade, including the internal and coasting navigation, which constitute the real riches and strength of the empire, and which may yet be extended to a degree far exceeding its present amount. On the absurdity of expecting greater advantages from foreign or colonial than from domestic commerce, Lord Sheffield made the following observations at the time when that peace was concluded which bereft the British nation of the sovereignty of America, an event which many persons, less enlightened than his lordship, considered the forerunner of England's ruin.— "Had America been settled by any other nation, it is more "than probable that Great Britain had been more populous "and powerful, that her taxes had been much lighter, and her "debt much less. Had the emigrants been retained at home, "whose progeny now (1784) form a people of nearly two mil-"lions, in a climate no ways superior, and in most parts inferior "to that of Britain and Ireland—had the lands at home, "which still continue waste, been given them on condition of "cultivation, and bounties been added to encourage new pro-"ducts of agriculture—had they been planted on the banks of "our rivers and our bays with a view to fisheries; they would "have increased the people and augmented the opulence of Great "Britain in the same proportion as the colonists have for many "years formed a balance to our population and to our power. "Nothing can be more impolitic, at least in a commercial na-"tion, than a fondness for foreign dominions, and a propensity "to encourage distant colonization, rather than promote do-"mestic industry and population at home. The internal trade "of Great Britain is much greater than its external commerce. "The best customers of the manufacturers of Britain are the "people of Britain. Every emigrant consequently, from being "the best customer, becomes the worst; and from being a "soldier or sailor, who may be brought forward on the day of "danger, ceases to be of any service to the state in any shape. "Let the considerations of advantage and protection hereafter "go hand in hand together. In most cases the expence of pro-"tection and civil government is much greater than the pre-"vention of competition is worth, a prevention which is very "seldom complete. The superior state of British manufactures "in general does not require other means of monopoly than

"what their superiority and cheapness will give. If we have "not purchased our experience sufficiently dear, let us derive a "lesson of wisdom from the misfortunes of other nations; who, "like us, pursued the phantom of foreign conquest and distant "colonization, and who, in the end, found themselves less po- "pulous, opulent, and powerful." (1)

The interest of individuals, as to profit, is the same as that of the state.

Having thus endeavoured to explain, from the highest authority, what are the relative degrees of advantage which the state derives from these various occupations; for what reasons agriculture claims the preference over manufactures, manufactures over commerce, and commerce over retail trade; and why domestic commerce is more useful to the public than the foreign trade of consumption, and the foreign trade of consumption than the foreign carrying trade; we will now proceed to show that these various occupations preserve the same relative order of preference in the degree of profit which they yield to the individual capitalist. (2)

We have uniformly considered the *cultivation* of land as the great public end to which every thing else should be conducive, because it provides for the immediate support and direct increase of population (3). Now it also happens, that in the early stages of society, while land is to be procured at a very moderate price, the cultivation of it is the direction of capital which produces the greatest benefit to the capitalist. Under such circumstances it repays him forty, fifty, and even an hundred fold, while the gains of all other occupations in the same period of society, are kept down by the competition of active foreigners from older states; such foreigners have necessarily more capital and more skill than the inhabitants of a state in so early a stage of improvement as we have supposed, and can consequently afford to undersell them. Nor is it at all extraordinary that the competition of foreigners operates so much more actively in the traffic of manufactures than that of the earth's rude produce. Among many other reasons for that competition it will be sufficient to specify this one,—that manufactured goods, being usually of less bulk and greater value than rude

(1) See also the spirited observations on this subject in the celebrated Cui Bono of Tucker, Dean of Glocester, A. D. 1781.

(2) 2 Smith, 121. 125.

(3) 2 Malthus, 137. 146. 2 Pal. 375. 2 Smith, 128.

produce, pay the expences of freight and insurance better. It is thus that they fail to bestow upon the native capitalist those advantages over strangers which he must always retain in a traffic of a more bulky kind, such as the sale of corn and other vegetable productions; accordingly in all countries the cultivation of land, the operation most beneficial to the state, has been the first object of individuals, inasmuch as it has yielded them the greatest profits. Afterwards, as more civilized modes of life have begun to prevail, and as the rise of rents and the competition in farming have begun to lower agricultural profits in any particular country, the advantage of supplying the artificial comforts of the society by manufactures has been found by individuals to become gradually greater than that of cultivating land, with an uncertainty whether the surplus produce which remains after feeding themselves and their families may not be left totally useless on their hands, as must frequently happen in the less populous states. When the profit of the manufacturers has fallen to the same level with that of the agriculturists, commerce, or the operation of buying and selling on a large scale at home or abroad, which we have seen is the next employment in the scale of national utility, is next sought by those individuals who have capitals adequate to such undertakings, for the sake of the superior wealth which it then yields in consequence of the reduction of profit occasioned by competition in the prior employments. Lastly, the previous existence of agriculture, manufactures, and commerce, now affords subsistence for retailers, who, we have seen, are in a public point of view the least advantageous of traders. These persons, wanting capital for the prior employments, are content to maintain themselves in this, rather than not be maintained at all; and retail trade, which would originally have been the employment the least profitable to the individuals themselves as well as to the state, becomes, under the existing circumstances, the most advantageous to both. But all these varieties of employment produce further effects than the immediate maintenance of the persons first concerned in them; they act and re-act upon each other. Each separate pursuit has led to improvements in its own particular department, and to an augmentation of wealth in general, which re-act upon agriculture, and increase its produce and its profits: this increase allures further competition, until the level of agricultural profit is reduced to that of the other occupations: then the enlarged population, and the augmentation of men's artificial wants, again cause the profits of the other occupations successively to become

greater than that of agriculture. Thus the progress of a nation from agriculture to manufactures, from manufactures to commerce, and from commerce to retail trade, the least profitable of all, continues to be conducted by individual interest, till the equalization of profit and the increase of human wants, through inincreasing civilization, stimulate agriculture afresh, and the process is slowly and insensibly but perpetually repeated.

But, not only is agriculture preferred to manufactures, manufactures to commerce, and commerce to retail trade, in the cases where the preference is dictated by the superior profit to the individual, but fortunately for the state the same preference appears still to exist even where the profits are only equal. The simplicity, quiet, and salubrity of an agricultural life, make it a more enviable lot than the life of the manufacturer (1). Again, manufactures are chosen rather than commerce, from the security which, by their fixed and permanent nature, they afford for the capital engaged, as well as from the personal influence which the manufacturer derives from the multitudes whom he employs; while commerce, in the last place, is preferred to retail trade, from the grandeur of its scale, and the liberality of its habits. (2)

The identity of the general with the *individual* interest is not less observable throughout the subdivisions into which the single employment of commerce distributes itself. We have before remarked, that commerce, properly so called, (that is to say) the operation of buying and selling by wholesale, is of three kinds: the *home* trade, the *foreign* trade of consumption, and the *carrying* trade. The home trade, which appears to be the most advantageous to the state, inasmuch as it sets in motion the greatest quantity of labour, is carried on by individuals in preference to any other, till competition brings the level of its profits so low as to make the foreign trade of consumption, which is the next in the scale of utility, the more beneficial employment; and foreign trade is sought and pursued till, from the same cause, the carrying trade best repays the capitalist. In the mean time, the increase of population and of domestic wants has widened the field for the home trade; the home trade again attracts capital, and the process is repeated as before: and the reason why, as long as the profit remains equal, the home trade

(1) 2 Smith, 125. 202. (2) 2 Smith, 127. 202.

is preferred to the foreign trade of consumption, and the foreign trade of consumption to the carrying trade, has been clearly explained by Dr. Adam Smith (1). In the home trade the capital is on no one occasion so long out of its owner's sight as it is on most occasions in the foreign trade of consumption; besides that he can better investigate the character and situation of those whom he trusts; and if he happen to be deceived, he better knows the laws from which he can seek redress. But if in the foreign trade of consumption the capital is out of the owner's sight for very long periods, in the carrying trade it will not necessarily be in his sight at any period at all: the risk, and the trouble and anxiety, which, even with all the precautions of insurance, a merchant must always endure, are, of course, so much the greater.

When the interest of the individual ceases in any particular channel of trade, the interest of the state accords; and it is of no avail to attempt to force it into another channel.

But as the exact coincidence of public interest with that of the individual, in regard to the different directions of capital, has hitherto been traced no further than while the direction of capital, which is *publicly* the most advantageous, continues to clear greater profit to the private capitalist than those directions which, in the abstract, are less advantageous to the public; we will now endeavour to show, that as soon as the profit of the individual in any particular employment of capital begins to fall below that of certain other employments, immediately the employment thus unprofitable to the individual becomes also unprofitable to the state. We will take our example from the comparative public utility of agriculture and manufactures.

It may appear that as agriculture has been allowed to be capable of supporting a greater quantity of labour than any other employment, it would be best for the state that every man's capital should be directed to agriculture, even though his individual profit were a little less than it might be if directed otherwise. It is not so. Suppose a law passed that no stock should be turned to manufactures, commerce, or any employment but agriculture. The decrease of profit to each capitalist which must follow from the direction of all men's capitals into one channel, would presently lower the wages of labour, so that population would receive a check, even in the first step: but this is not all; as soon as the competition should have reduced

(1) 2 Smith, 120. 125

the profits to the lowest rate at which they could maintain the capitalist and his family, no further capital would be employed at all, unless it were permitted to flow into other more open channels; for no man would embark his capital without the prospect of any advantage whatever: nay more, it is obvious that even though a certain profit should be still attainable, yet if that profit were so small as to be barely sufficient for a hard maintenance, which, under such a competition, must inevitably be the case, no agriculturist could in any possibility lay up a store with which he might either enlarge his own scale of farming, or encourage the industry of his neighbours; so that the consequence of forcing capital into the channel of agriculture, when the channel of manufactures would be more profitable to the individual capitalist, must be simply this, that only a certain number of capitalists could make any profit at all; that the profit of these few after a little while would be too small to allow any improvements or advances in agriculture, the very employment by which population is to be supported; and that the wages even of this limited quantity of employment would be reduced, by this low rate of the employer's profit, to the smallest stipend upon which it is possible for human nature to subsist. The produce too of almost every district can support many times more hands than are necessary to raise it; but since, after the passing of such a regulation as we have supposed, there would be scarcely any persons capable of purchasing this surplus produce, except other agriculturists, who would have a surplus produce of their own to dispose of, it would never be purchased at all; it would not continue to be given away, for that could not answer to the capitalist; and the consequence must be, that it could no longer be raised: no man would rent more land than was necessary for the maintenance of his own family; the landlords would even receive these rents in kind, because in such a state of things there would be hardly any property in the kingdom except rude produce; and the great proprietors of the soil would be compelled, for want of manufactured produce, to waste their whole income in prodigal hospitality (1). It is impossible to conceive a state of things more unfavorable to population, and indeed to improvement of every kind. It appears then, that though agriculture be in the first instance more profitable to individuals than any other direc-

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(1) ante 2, note 3.

tion of capital, and, in conducing to the support of a greater population, more beneficial also to the state; yet, if capital be unnaturally forced into this channel, the advantages are diminished, and in a little while totally destroyed. It will happen therefore that manufactures, if at that particular time they be most profitable to the individual, will become the most profitable to the state. The number of persons immediately set at work may not be so great, but the greater be the profit of the capitalist, the greater is likely to be the whole quantity of labour that he will ultimately set in motion, in some shape or other, by adding that profit to his capital, and thus enlarging the scale of his own commerce; or by spending that profit, and thus encouraging the industry of others; or by lending that profit at interest, and thus at once enriching his own family, and furnishing capital to new adventurers. The same principle, though the inconveniences would be of a different kind, applies equally to the unnatural compulsion of capital into any other channel which may happen at the time to be unprofitable for the individual. As, for example, into the channel of manufactures rather than of commerce, of commerce rather than of retail trade, of domestic rather than of foreign commerce, and so on in every other instance; though the channel into which the capital may be thus compelled, be really with equal profits the more advantageous to the state.

After all these deductions it can scarcely be necessary to add, that whenever we may hereafter speak of the superior advantage to be derived by the state from one employment or another, it will be assumed that the clear profits of that employment so considered as superior, are at least equal to the profits of the employments with which it may be compared; because, if the clear profit upon capital in one employment be greater than in another, then, according to the principles already laid down the employment so affording the greater clear profit is, *ipso facto*, proved to be the more advantageous to the state. The great position, that no occupation is ever encouraged by unnaturally forcing capital into it, ought, indeed, to be sufficiently evident from this plain consideration, that the increased competition of capital always diminishes profit, and the diminution of profit in any employment can be but a very slender encouragement to the undertaking of it.

The public are not gainers by the depression of the rate of profit.

It seems to have been thought, that the public are gainers by the depression of the rate of profit in any way whatever; but this is a great error (1). No state which has not reached its full perfection, its utmost complement of comfortably supported population, can be said to thrive greatly, unless the profits of all industry be very considerable. High profits, where competition is free, that is to say, profits universally high,* are at once the symptom and the cause of a nation's prosperity: the symptom, inasmuch as they usually evince that the industrious portion of the state is amply provided with the means of subsistence; and the cause, inasmuch as by giving to that class an extensive power over the land, they furnish the comfortable means of increasing the population.

What foreign export and import trades are best for the state.

We will now concisely consider those frequently discussed questions, whether it be most advantageous for a nation to export manufactures, for rude produce? or, secondly, manufactures for manufactures? or, thirdly, rude produce for rude produce? or, fourthly and lastly, rude produce for manufactures? The substance of the doctrine usually received (2) appears to be this: that the trade most beneficial to the state is the export of manufactures for rude produce, because this kind of traffic not only enables the people, by the quantity of employment it creates, to consume their own rude produce, and thus increases the amount of the comfortably supported population, but by bringing back an additional quantity of rude produce, which usually consists either of the materials for fresh manufactures, or of human food, supplies the means of employing or of comfortably supporting a still greater population. It is supposed that the kind of export next in utility is the export of manufactures for other manufactures; because here is one of the same advantages as in the former case, the advantage of furnishing profitable employments to the people at home, and so enabling them to consume their own raw produce; though not the other advantage, which is the increase in the supply of raw produce, for the employment and maintenance of a still greater population. The

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(1) 1 Smith, 91, 2. Sir J. Child on Trade, Preface, 12, 13, and context of Work, 19, 20; where this position is laid down and established: "Wherever wages are high universally throughout the whole district, it is an infallible evidence of the riches of that country, and vice versa.

(2) 2 Paley, 376

export of one kind of raw produce for another has been called the third in value; a kind of traffic which, if that part of the raw produce consisting of human subsistence be taken as equal in the export and the import, will leave no comparative advantage to either country with respect to the employment or sustenance of her population; though even here, as in all other exportations, is to be found this positive advantage, that as the sale of such a quantity of rude produce abroad proves the demand for it to have been very trifling at home, the probability is, that if it could not have been exported for some other kind of rude produce for which there did exist a considerable demand at home, it would never have been produced at all, and the population must therefore have been smaller or less comfortably supported by the whole value of the quantity of subsistence so exported. *Fourthly* and lastly—the traffic least advantageous of all, is considered to be the export of rude produce for manufactures, because here the food which constitutes the support of the people, and the materials which furnish their employment, are sent abroad without any return in kind, and without having employed or maintained that amount of domestic industry which they might have employed and maintained if they had been consumed at home.

Doubts however may be entertained upon the accuracy of this mode of assigning the four comparative values. The positions have been laid down as *uniformly* true, which are true only under certain circumstances. Thus it is certainly true that the exportation of manufactures for rude produce in the cases of states situated as Holland and the Italian republics were in their most prosperous times, is a symptom of national wealth. Their population was then so flourishing that the whole produce of their own small territory was insufficient to support it; and their exportation of manufactures for rude produce was a symptom of this fullness and opulence: but it does not follow, therefore, that the way for *every* nation to become opulent is to export manufactures for rude produce. If America were to export manufactures and buy rude produce, is it not clear that she would be employing her capital in the way of all others the least calculated to enrich her. Of what use would be to her the rude produce she might purchase; she already raises more than her population can at present consume. Her case is that of a new colony, where land as yet continues abundant enough to

answer all the present demands of increasing population. This condition of ease and plenty cannot continue, because the population having always the tendency to increase, will rapidly rise to the level of the attainable subsistence, and then the situation of America will be exactly the same with that of the older states; but in the mean time, and under her present circumstances, what would America get by selling manufactures? The plenty and cheapness of good land in her states makes labour so exorbitantly dear, that even if her workmen had skill enough to complete for foreign markets manufactures of as good a quality as those which are already sold there, her capitalists, having been compelled to pay so heavy a rate of wages, could by no means afford to sell their goods at a price as low as the traders in the European states, where the greater amount of population makes labour so much cheaper. Therefore it happens that America, so far from finding it beneficial to export manufactures for rude produce, has found that very practice, which in the before-mentioned scale is laid down as the least advantageous, to be in fact the most so, the export of rude produce in exchange for manufactures. There is scarcely any nation which has not in some stage or other of its advancement found each one of the four traffics more advantageous for the time than any of the other three (1).

The only principle upon which the comparative advantages resulting from any particular interchange of commodities can be accurately estimated, is the before-mentioned principle of individual interest. The variations which circumstances are continually causing in the relative gains of different exports and imports to the individuals concerned, must make it impossible to construct a scale *universally* true; but it seems very possible to devise a scale which may be true enough for certain *general* purposes of deduction. It is submitted that, with a view to all the successive stages of a country's civilization and improvement, it should seem advisable to reverse the order of the scale which has generally been given, because such reverse would best accord with the principle of individual interest. It should be considered that in the first instance it must be generally most advantageous to export rude produce for manufactures, because the wages of labour in all new states are too high to pay individuals for any employment of

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(1) See Tucker on Trade, 35, 36.

capital except those of agriculture, which recompense fifty and an hundred fold (1). That in the second instance the rude produce should still be exported for rude produce of another kind which either may supply the wants of population already sufficiently provided with their *native* produce, or, if the rude commodity exported be not subsistence, may prepare a stock of manufactures as the opening begins to be afforded for them by the reduction in the price of labour consequent on the increase of population; and the reason why it is submitted that the exportation of our own rude produce, to be exchanged for that of other countries, ought to rank next in the scale, after the exportation of our own rude produce to be exchanged for the manufactures of other countries, is founded on the same consideration as before; namely, that until the price of land rises and the price of labour falls, agriculture will pay more amply than any other employment of capital, whatever be brought home in exchange for the crop, and will consequently enable the exporter to sell rude produce with the greatest possible profit, in which profit it will be remembered consists the profit of the state. That in the *third* instance manufactures may be more advantageously exported than rude produce, because labour having by this time become more plentiful is of course cheaper, and the export of manufactured produce is therefore more profitable; and with respect to the commodities imported in return for this manufactured produce they will generally be more useful to the state when they consist in the manufactures of other countries than in their own rude produce; because, though the land at home may be supposed to have been in great measure brought into cultivation, yet probably even in this advanced stage of population rude produce may, for the most part, be raised at home more cheaply than it can be brought from abroad, with the additional charges of freight and insurance; whereas the manufactures peculiar to other countries, besides that in general they can be made in those countries more skilfully and more cheaply, are usually less bulky than rude produce, and consequently cost much less to the buyer in their conveyance from abroad (2). *Fourthly*, when the land is become so highly cultivated and the population so numerous, that rude produce with all the charges of insurance and freight may be brought from abroad more

(1) 2 Smith, 128. 205. 2 Malth. 153. 158.

(2) 2 Smith, 205.

cheaply than it can be procured at home, then, and not till then, is it most advantageous in general to export manufactures for rude produce; nor is there any thing inconsistent in the proposition, that while the exportation of rude produce for rude produce is the second in this scale of utility, the exportation of manufactures for rude produce is only the fourth: for though it is true that the purchase of rude produce must be attended with greater expence of freight and insurance than the purchase of manufactures in all cases, that is, whether the equivalent exported to pay for it be our own mannfactures or our own rude produce, yet as the gain of a bargain depends altogether in our clear profit in the whole transaction, it is better for us in the second instance to buy the rude prodace of another country at a high price, so we sell our own rude produce with a proportionately greater profit, than to speculate in exporting manufactures of our own with gain of much smaller amount, and so to give up the more profitable business of exporting our rude produce. But when we have arrived at the third and fourth stages, when we have no longer any rude produce to spare, and can export only manufactures, then we can much less afford to purchase the rude produce of other nations, out of the comparatively small profits that we can realize by our own manufactures, than we could in the beginning of our career, when our own profits were so high, when in short we had the profit not only of our own labour and capital, but of nature's labour too, which is the advantage peculiar to the raising of rude produce. On the whole, therefore, it should seem best to go on selling our own raw produce as long as we can, first selling it for the manufactures of other countries, and secondly, rather than give up our own superior profit, selling it for foreign raw produce (1); afterwards, when the profits which these two occupations yield, in comparison with the exportation of manufactures, become too much reduced by competition, then, thirdly, to export our own manufactures for those of other countries, rather than, fourthly, to export our own manufactures for their raw produce; because, with only the same profit to ourselves, we shall be obliged, in consequence of the greater freight and insurance on bulky commodities, to pay more for their raw produce than for an equal intrinsic value of their manufactures. This scale is not however given as being *universally* applicable, for wherever it shall

(1) 2 Smith, 205. 2 Malthus, 153.

cease to coincide with the interest of the individual capitalist, it will cease to be an accurate measure of the public advantage to be derived from any particular species of export or import. This abstract view however is given rather as a general observation of the course in which the conjoint and inseparable profit of the state and of the individuals usually flows, than as a rule of practice.

The exception to this proposed scale will be easily understood. For instance, an exception would arise in the case of a spice island, or in any other instance where, from singular circumstances of nature or art, any particular kind of rude produce or manufacture can be raised or wrought up at something like a monopoly price. Thus where peculiarly curious pottery can, from the advantages of soil, and the long practice of the inhabitants, be sold at a greater profit than can be gained even from the raising of corn, it will be the interest of the country to export this fine manufacture in the first instance, rather than the produce of the soil. Nor is it only with regard to exports that exceptions will arise to such scale. There will also be exceptions with regard to imports: for instance, though it may be generally more advantageous for a country to import manufactures than rude produce, yet if a greater effective demand exists in that country for the rude produce than for the manufactures, and a greater profit can consequently be made by the individual capitalist from importing it, its importation will be more advantageous to the country than the importation of manufactures, though such importation of manufactures may in general seem preferable, according to the abstract scale. It will be of no avail to say, that if the wants of the nation would have confined themselves to commodities which might be imported to greater advantage, national as well as individual opulence would have gone on more rapidly: we must take human nature as we find it. The great stimulus to labour is the hope of gratifying our wants, whatever they may be. A man will exert himself to obtain a luxury, such as for instance a foreign wine, who would not exert himself to increase the stock which he may have lent at interest: and yet the latter process might have added more to his own wealth and that of the nation (1). To encourage his labour therefore, he must be enabled to obtain the

(1) 2 Paley, 372—374. Tucker on Trade, Introd. 1, 2.

object for which his labour will be willingly undertaken; and the capitalist, by enabling him to do this, not only makes the greatest possible profit for himself, but sets in motion the greatest quantity of national labour which, under existing wants and circumstances, can be employed; though not the greatest quantity which might have been set in motion, if those wants and circumstances, had been different: and it will be easily seen that these exceptions depend on the same principle as the rule or comparative scale itself; namely, upon the principle of superior profit, upon the great maxim, that what pays the capitalist most amply, is also the most beneficial to the state: the same principle too it is which in this as well as in all other employments of capital, determines the stage or point where one kind of traffic ceases to be most beneficial, and where those kinds of traffic which may be below it in any abstract scale, begin to be practicably preferable under the existing circumstances.

CHAP. II.

Of the Commercial Law of Nations in general; and of the natural and positive Law, whether universal, customary, or conventional; and, in particular, of Treaties, and their Construction.

THE intercourse of commerce affording, as we have seen, a mutual and incalculable advantage to the states that engage in it, has been provided for and protected by laws almost from the beginning of civilized society. Our object will now be to inquire what legal principles and rules have been established with respect to commerce. In considering these principles and rules of commercial law, we are first to inquire how the commerce of any country, and of our own in particular, may be affected by the acts of *foreign states*; next, how the commerce of our own country in particular is publicly affected by her own *political* regulations; and lastly, how such commerce is affected by those municipal regulations which relate merely to the *private interests* of trade: and we shall then consider the instruments and securities employed to facilitate commerce; and close our inquiries by examining the remedies for injuries to commercial rights. The first of these inquiries will lead us to take a concise view of the *law of nations* in general; for it is obvious that the commerce of a country can never be lawfully affected by any act of a foreign state, unless that act be enjoined, or at least authorized, by the law of nations. The law of nations comprehends the principles of national independence, the intercourse of nations in peace, the privileges of ambassadors, consuls, and inferior ministers; the commerce of the subjects of each state with those of the others, the grounds of just war and the modes of conducting it, the mutual duties of belligerent and neutral powers, the limit of lawful hostility, the rights of conquest, the faith to be observed in warfare, the force of an armistice, of safe-conducts and passports, the nature and obligation of alliances, the means of negotiation, and the authority and interpretation of treaties.

These and many other important subjects, forming a complete practical system of the law of nations, and obviously most materially affecting commerce, are first to be considered. The knowledge of them is necessary to negotiators and statesmen, and may frequently be important to private men in various situations in which they may be placed.

Definition. The law of nations is *defined* to be the science which teaches the rights subsisting between nations or states, and the obligations correspondent to those rights; which modifies the intercourse of independent commonwealths in peace, and prescribes limits to their hostility in war (1). This law is naturally founded on the principle that the different nations ought to do to each other, in time of peace, as much good, and in time of war as little harm, as may be possible, without injuring their proper real interests (2).

It has been observed, that the law of nations at present established owes its existence in a great measure, to the conciliating and humanizing influence of the christian religion. And it is not amongst the least of the innumerable blessings which that faith has conferred upon the world, that it has established the intercourse of a great part of mankind upon one common basis of generally acknowledged duties, and abolished those wild, capricious, and sanguinary customs, which previously existed even amongst nations so highly civilized as the Romans and the Carthaginians (3). In later and happier times, having been drawn more closely together by the belief of *one* religion, the nations of Europe have been induced to agree upon a certain code, for their mutual regulation; and in all cases of doubt and disagreement, arising *upon* that code, their *common religion*, that of *christianity*, points out the same principles of natural justice, to be equally appealed to by all, as the unfailing rule of construction.

It is true that, in our *own time*, for practical purposes, the law of nations has for awhile been of little avail among the states of Europe. The circumstances of the last twenty-five years have

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(1) Vattel's Prelim. p. 55. s. 3. Mackintosh, Disc. 3, 4.

(2) Montesq. de l'Esprit des Lois, liv. 1. c. 3.

(3) 2 Ward's Law of Nations, 1—11. 339, 340.

been of so extraordinary and so gloomy a colour, that, in the anarchy of revolution and confusion of conquest, principles which had stood fixed for *centuries*, have been shaken from their foundations. We must observe, that in every age the *law of nations* must be less secure from violation than the *municipal law* of a *particular state*; because the municipal law is upheld by the sovereign power of the realm, which is equally exalted above the individual *committing*, and the individual *sustaining* the injury; and which punishes the *first* and *lightest* infraction of every rule, before disorder gathers strength to *destroy*. The *law of nations* is, *among nations*, what the *municipal law of a state* is among the *subjects* of that state: but then there is no sovereign power among *nations* to uphold the international law: there is no tribunal to which the *oppressed* may appeal against the *oppressor*.

This is a defect inherent in the constitutions of *all international* codes, and it has been felt with more than usual severity in *modern* Europe, because even the slight check which at any former time existed to prevent the injustice of particular states (the check provided by the general anxiety of governments to preserve the balance of power against individual usurpation) for a time was suspended, and the immense and overpowering force of a single people was able to triumph alike over the opposition of the weak and the opinion of the wise. Among the various aggressions which the stupendous power of our enemy enabled him to commit for awhile with impunity, none were more remarkable for the acrimony of their spirit or for the mischievousness of their consequences, than the violent measures which he employed, throughout the countries under his control, to debar them from the advantages of a freely circulating commerce: but the injustice of those measures, revolting against the established principles of the law of nations, at length roused the states of Europe to unite in one common cause, and to restore and again bring into action those rules of the commercial law of nations which we are now to consider.

The law of nations has been variously subdivided by different writers; and perhaps there is no distribution clearer than that of M. de Vattel, who admits *two* kinds of international law, the *natural* and the *positive*. Division of law of nations.

The *natural* law of nations.

The *natural* or *primary* law is that of God and our conscience: the law which enjoins us to do good to our neighbour, whether, in literal strictness, he may have a *perfect* right to demand such treatment from us or not (1). This is a law of as strong obligation as the most distinct and positive rule; though it may not be always capable of the same *precise definition*, nor, consequently, may allow the same *remedies to enforce its observance*. As an individual is bound by the law of nature to deal honourably and truly with other individuals, whether the precise acts required of him be or be not such as their own municipal law will enforce; just so a state, in its relations with other states, is bound to conduct herself in the spirit of justice, benevolence, and good faith, even though there be no positive rules of international law, by the letter of which she may be actually tied down. The same rules of morality which hold together men in families, and which form families into a commonwealth, also link together commonwealths as members of the great society of mankind. Commonwealths, as well as private men, are liable to injury and capable of benefit from each other; it is, therefore, their duty to reverence, to practise, and to enforce those rules of justice which control and restrain injury, which regulate and augment benefit, which preserve civilized states in a tolerable condition of security from wrong, and which, if they could be generally obeyed, would establish and permanently maintain the well-being of the universal commonwealth of the human race (2). This *natural* law has been called by Vattel the *necessary* law, because nations are absolutely bound in conscience to observe it; and by Grotius it has been entitled the *internal* law, because it is obligatory on nations in point of *conscience* (3).

The positive or secondary law of nations.

The *positive* or *secondary* law is *threefold* (4): *first*, the *universal voluntary* law, or those rules which are presumed to be law, by the uniform practice of nations *in general*, and by the manifest utility of the rules themselves (5). *Secondly*, the *customary* law, or that which, from motives of convenience, has, by

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(1) Vattel, Prelim. 58. 60. Peake's Rep. 116. 2 Hen. Bla. 259.

(2) Mackintosh, Disc. 7.

(3) Vattel, 68. s. 7.

(4) Vattel, Prelim. 66. s. 27.

(5) Vattel, Prelim. p. 64. 66. s. 27.

tacit, but implied agreement, prevailed, not generally indeed among all nations, nor with so paramount an utility as to become a portion of the *universal* voluntary law, but enough to have acquired a *prescriptive* obligation among certain states so situated as to be mutually benefited by it (1). And *thirdly*, the *conventional* law, or that which is agreed between particular states by *express treaties*, a law binding only on the parties among whom such treaties are in force (2). These two last branches of international law, the customary and the conventional, though they are not universal, derive their authority from the principles of the voluntary law, which is universal; inasmuch as the conventional law depends on the universal principle, that men must be considered as bound by their own compact: and the customary law depends on the universal principle, that what has been for time immemorial the usage among certain parties, must be *primâ facie* presumed to have been mutually advantageous, and therefore to rest upon their *tacit* compact, just as the conventional law rests upon their express compact.

The customary law, however, has been considered as not irreversible; for as it rests only on implied agreement, express dissent, of necessity, may annul it: and any state, upon giving notice that she chooses no longer to abide by a particular custom, may set it aside; provided the time which she selects for this notification be not when a case may have arisen, or be contemplated, upon which the custom would operate (3). But as to *conventional* law, a nation cannot in strictness relieve herself, by any notice, from the duty of observing it; because that would be, in fact, giving notice of *her own intention* to break her own word (4). Nor can she relieve herself from the duty of the voluntary law; for that would be to set herself *above* those received principles of general utility by which alone society is held together. It must be unnecessary to observe, that she cannot release herself from the duties of the natural law; for such a defection, though it may be beyond the jurisdiction of all positive law, and therefore sheltered against the

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(1) Fennings and others v. Ld. Grenville, 1 Taunt. Rep. 241. 248.

(2) Vattel, p. 65. s. 24.

(3) Vattel, Prelim. 66. s. 26. Marten, L. N. 356.

(4) Vattel, Prelim. 60. s. 11. Marten, L. N. 354.

direct interference of human coercion, would be to emancipate herself by her own act from all the obligations which are naturally and universally imposed upon all mankind.

Some ingenious writers have attempted to establish, that this *secondary* or *positive* law, in all its three divisions, whether voluntary, customary, or conventional, is nothing more than an *express* declaration of that natural law which existed from the beginning of time, but which, for the want of circumstances requiring its interference, had slept unnoticed till the moment when the *necessities* or *conveniences* of some powerful nation *demanded* its *definition* and *establishment*.

Thus, it is said (1), "that if certain duties are observed now, "which were not considered as duties in former days, this "observance is not in consequence of any new law, but merely "that an eternal and necessary law has now a scene in which it "may exert its operations; and if the rights and duties of this "new scene are not incongruous with the law of nature, what is "called the secondary law of nations has really no existence, "nor can be said to be introduced by positive or arbitrary "contracts, or by voluntary confederacies, which is fairly the "prescription of right reason. Hence all the obligations which "arise from what is called the *jus secundarium*, were virtually "laid upon us before; but could never be known till something "called them forth (2)."

But although this reasoning is just to a certain extent; that is, as far as the law of nations is composed of duties purely moral; yet there are a variety of cases in which it was clearly requisite, that *some* international rule should be laid down, but for which *natural* reason has made no direct provision: cases which, for the sake of general quiet, must be decided in one way or another, but which may be decided in either way with equal conformity to the natural principles of right (3). Thus, for example, the law of nature seems to declare that accredited ministers ought to enjoy certain immunities, in order to enable them to transact the concerns of the state by which they are deputed; but the

(1) By Mr. Ward in his Law of Nations, vol. 1. p. 29

(2) 1 Ward's Law of Nations, 30.

(3) Vattel, Prelim. 58, 9. s. 19.

law of nature does not declare what kind of credentials shall be necessary to constitute them accredited ministers, and thus entitle them to these immunities; yet it is of the highest importance that the *form* should be determined, or the agents of private persons might claim the benefits of a public character, and commit a thousand irremediable frauds. Such points as these must therefore be gathered from the universal voluntary law of all nations, from the established customs of particular states, or from the express treaties existing between one community and another. An instance illustrating the use of the *customary* law, where the natural law had made no provision, occurred in the case of Fennings v. Lord Grenville (1), where it appears, that, by the custom of the whale fishery among the Gallipagos Islands, he who strikes a whale with a loose harpoon is entitled to receive half the produce from another person who may follow and kill it: and that by the custom of the Greenland whale fishery, unless he who strikes a fish continues his dominion until he has reduced it into his possession, any other person who kills it acquires the entire property: and Mr. Justice Chambre laid it down, that there must of necessity be a custom in these things to govern the subjects of England, as well amongst themselves as in their intercourse with the subjects of other countries; the usage of Greenland is held to be obligatory, not only as between British subjects, but as between them and all other nations; that he remembered the first case upon that usage, which was tried before Lord Mansfield, who was clear, that every person was bound by it; and said, that were it not for such a custom, there must be a sort of warfare perpetually subsisting between the adventurers; and he held it strongly binding, from the circumstance of its extending to different nations. The same necessity must prevail in the South Seas, although the fishery has not been so long in use, in order to regulate our intercourse with the French, Americans, and others who resort thither. Thus it will be seen that the distinction between these positive or secondary laws, and the natural or primary law, is not so unimportant as it may at first appear.

The international rights and provisions which we have now to consider, relate to one subject only, the interests of *commerce*.

The law of nations considered in its more im-

(1) 1 Taunton's Rep. 241.

mediate relation to commerce, and how it is received in Great Britain.

"Merchandize," says Molloy (1), "is so universal and extensive, "that it is in a manner impossible that the municipal law of any "one realm should be sufficient for the ordering of affairs and "traffic relating to merchants." The law concerning merchants is called the *law merchant*, from its universal concern, whereof all nations do take special knowledge. Burlamaqui, in his natural law (2), asserts, that "the very aim of the law of "nations is to serve as a rule for commerce." The law of nations on this head, as well as on every other, is acknowledged by the English municipal law, and forms indeed a very important branch of it. In arbitrary states, says Sir William Blackstone (3), the law of nations whenever it contradicts or is not provided for by the municipal law of the country, is enforced by the *royal* power; but since in *England* no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations, wherever any question arises which is properly the object of its jurisdiction, is here adopted in its full extent by the common law, and is held to be a part of the law of the land. "And those acts of parliament which have, from time to time "been made to enforce this universal law, or to facilitate the "execution of its decisions, are not to be considered as intro-"ductive of any new rule, but merely as declaratory of the old "fundamental constitutions of the kingdom; without which it "must cease to be a part of the civilized world. Thus, in "mercantile questions, such as bills of exchange and the like, "in all marine causes relating to freight, average, demurrage, "insurances, bottomry, and others of a similar nature: the "law merchant, which is a branch of the law of nations, is regu-"larly and constantly adhered to: so too, in all disputes relating "to prizes, to shipwrecks, to hostages, and ransom bills, there "is no other rule of decision but this great universal law, col-"lected from history and usage, and such writers of all nations "and languages as are generally approved and allowed of." Lord Mansfield, in delivering judgment upon the case of Triquet and others against Bath (4), cited, from a note of his own, the case of Buvot v. Barbut, in which Lord Talbot then chancellor declared a clear opinion, that the *law of nations*, in its *full extent*, was *part* of the *law of England*.

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(1) 2 Molloy, pp. 322, 3. b. 3. c. 7. s. 15.

(2) Chap. 6.

(3) 4 Bla. Com. 67.

(4) 3 Burr. 1481.

Before we proceed to state in detail the law of nations as it affects commerce, it is advisable to ascertain, with as much exactness as possible, the *sources* from whence we may gather with accuracy the provisions of this international law, thus generally binding upon the various states, and thus peculiarly acknowledged by the British constitution. Unfortunately, the provisions of the *voluntary law*, which, as we have seen, are the rules expressly and practically laid down by nations for their universal guidance, are not collected in any written code of public authority, any more than the provisions of the *natural* law. This leaves a considerable degree of doubt and obscurity on the subject; for whenever any powerful state finds it her interest to violate some provision either of the natural or of the voluntary law, she has only to plead the want of authoritative enactments on the particular point in question, and to prove the force of her plea by the strength of her arms. In the absence of higher sanctions, the ordinary practice of nations and the writings of eminent authors have been held up as the rules of international jurisprudence (1); but on some questions, which are considered within the province of the voluntary law, as well as on many questions of natural law, the opinions of these learned persons are so widely at variance, that, too frequently, the rule by which the conduct of a nation should be guided in a particular emergency is, in truth, no law established by common consent, but a rule which each state must gather as well as she can, under the particular circumstances of the case, from her own ideas of natural justice. However, there is no doubt that the maxims laid down in the works of eminent writers will always be regarded as of great consideration by a state desirous of acting honestly; and it can be only in instances where the natural reason of the case contradicts those maxims, that any advantage will be taken by such a state, on the ground of insufficient authority. Where the principal writers exhibit no contrariety of opinion in their statement of any rule, the presumption in favour of their maxims is, of course, very strongly increased; and few cases can possibly arise in which a nation will venture to oppose the uniform consent of such authorities, unless she be powerful enough to set herself above all ordinary law and

(1) Per Lord Mansfield in Triquet v. Bath, 3 Burr. 1481.

all natural justice, and rely on what has been denominated the right of the strongest.

England has always been prompt to acknowledge the authorities both of universal practice and of eminent writers. In the before-mentioned case of Triquet and others against Bath (1), Lord Mansfield went on to state it, as the declaration of Lord Talbot, that the law of nations was to be collected from the *practice of different nations* and the *authority of writers*: "accordingly," continues Lord Mansfield, "he argued and determined from "such instances, and the authority of Grotius, Barbeyrac, "Binkershock, Wiquefort, &c., there being no English writer "of eminence upon the subject."

The same principles are also laid down by elementary writers of high authority (2). To the names of Grotius, Barbeyrac, and Wiquefort, may be added those of Puffendorf, Wolf, Vattel, Selden, Valin, Clerac, Pothier, Burlamaqué, Emerigon, Roccus, Casasegis, Loccenius, Santerna, Maline, and Molloy. There are yet other authors of old time, not in so great credit as these, but whose works still deserve and enjoy considerable reputation; and of late several living writers have published treatises of high estimation for accuracy and ability, but wanting, of course, that authoritative weight which antiquity and long acquiescence bestow.

What has been said of these elementary works, as the great sources of international law, should be understood only with respect to those *principles* which are of universal and permanent obligation, and fall under the heads of the *natural* or of the *voluntary* law. For, of course, those laws which are merely *customary* or *conventional*, are not to be found completely detailed in any *elementary* treatises. There are accidental allusions indeed to particular provisions of them, scattered up and down in almost all these works; but, as Vattel has observed, it was not to be expected that any such essay should contain *explicit details* on a subject so liable to perpetual variation;

(1) 3 Burr. 1481; ante, 33. See also Viner's Abridg. Merch
(2) Com. Dig. Ambassador, B. A. 1. 3 Bla. Com. 273.

nor will it be consistent with the plan of the present undertaking to treat it very minutely. (1)

The principles of natural law are immutable, for they are the principles of original justice and honour, founded, as Vattel expresses it, on the nature of things and the nature of man (2). The principles of *voluntary law* are not to be changed without universal consent; for they are only the principles of *original* justice and honour, reduced into practical rules, and guarded by necessary forms. But the regulations of mere *customary* law, as we have seen, may be changed at any time, upon reasonable notice, by any nation resolving to withdraw her consent from the general agreement on which each custom rests, though a few individuals of such nation cannot, without the authority of the state, of their own accord alter such customary law so as to affect other persons (3). There will probably be occasion to notice some of the provisions of this law, in treating certain topics which fall within the latter divisions of the work. In the meantime it will suffice to offer a short historical enumeration of those mercantile codes of *customary law*, which the states of Europe have considered to be of the highest authority in their mutual dealings, as *records* or *evidences of their* ancient consent to particular usages. Almost all the provisions of these codes relate exclusively to *maritime* affairs; for, in consequence of the superior cheapness of water-carriage, and of the maritime situation of several among the chief commercial states, the greatest part of the international trade has been usually conducted by sea.

The *earliest* system of *marine law* was compiled by the Rhodians about 900 years before the christian æra. A collection, bearing the denomination of *Rhodian laws*, is to be found in Vinnius; but it is believed to be spurious. If the other commercial states of antiquity had any maritime institutions, they are not now extant. It was towards the end of the eleventh century, about the time of the first crusade, that the earliest code of more modern sea-laws was compiled. This code was

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(1) Vattel, Prelim. 65. s. 24, 25.

(2) Vattel, Prelim. 64, 65. s. 22, 23. s. 8.

(3) Fennings v. Ld. Grenville, 1 Taunt. 248.

arranged by the people of Amalphi: it is thought to have been principally collected from the Rhodian institutions, and appears to have been generally received, during a considerable period, in the countries bordering on the Mediterranean. But in process of time, as the maritime states, which gradually arose in Europe, began to set up codes of their own, great inconvenience was felt from the discordance of the various enactments; and a new collection, compiled from all those which had gone before, was established, as Grotius informs us (1), by the authority of almost all the sovereigns of Europe: this new collection was entitled *Consolato del Mare*. In the thirteenth century it was received as law in Italy, Germany, France, and the Greek empire; and Vinnius affirms that most of the marine laws in Spain, Italy, France, and England, are borrowed from it. It seems to be considered as a branch of international law; and, in spite of certain defects, its regulations are of high authority in all the maritime states of Europe. Some differences of opinion have existed as to the authority which first established the celebrated *Laws of Oleron:* however, they were indisputably promulgated *about the time* of Richard the first, and are held to be of great authority. Of great authority also, and of equally uncertain date, are the ordinances made by the merchants and masters of *Wisburg*, a city in the island of Gothland, anciently much celebrated for its commerce. They *appear* however to have been promulgated during some part of the *thirteenth century*.

Another system of laws, drawn up by the deputies of the *Hanseatic league* in 1597, and confirmed with additions in 1614. has obtained much consideration in the maritime jurisprudence of nations (2). But the most complete and comprehensive system of marine law, is the famous *ordinance of marine of Louis the Fourteenth*, published in 1681. This excellent code was compiled and arranged by a very masterly hand, under the inspection of Colbert the celebrated minister of that prince, upon an attentive revision of all the ancient sea-laws of France and other countries, with the assistance of the most learned men of the time; and upon the consultation with the different parlia-

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(1) Grotius, b. 3. c. 1. s. 5. note 6.

(2) See remarks on this code. 2 Ward's Law of Nations, 276 to 290.

ments, the courts of admiralty, and the chambers of commerce, in France. It forms a system of whatever experience and the wisdom of ages had pronounced to be most just and convenient in the marine institution of the maritime states of Europe: and though it contains many new regulations, suggested by motives of national interest, yet it has hitherto been esteemed a code of great authority upon all questions of maritime jurisprudence. Lord Mansfield, who appears to have taken much pains to obtain the best information, and to possess himself of the soundest principles of marine law and of the law of insurance, seems to have drawn much of his knowledge upon these subjects from this ordinance, and from the elaborate and useful commentary of Valin. This may be perceived in many of his judgments upon questions of insurance, though his lordship does not always think it necessary to cite his authority (1). By the practice of modern Europe, full and explicit commercial treaties are usually entered into, declaring in express terms the rules which shall govern the intercourse of the respective states; so that questions upon the natural law of nations, and the universal voluntary law and customary law, are less likely to arise than in former times; but still discussions upon these subjects do occasionally arise; and we shall find that it is then the course to consult these authorities upon the subject, and hence the necessity of noticing them in this work. (2)

If this law natural of nations, or that which is voluntary or customary, as distinguished from treaties, be violated, as by the illegal confiscation or seizure in another state of the effects of the subjects of Great Britain, the course has sometimes been to petition His Majesty that the damage be ascertained by the Court of Admiralty, and that intimation of the amount be given to the minister of the state where the confiscation took place, and then to

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(1) 1 Marshal on Insurance, Prelim. Dis. 18.

(2) It was from these, and other similar resources, that Lord Mansfield framed the celebrated letter of the duke of Newcastle to the king of Prussia's secretary, which is considered as a standard of authority upon the law of nations, as far as it respects the right to seize enemies property on board neutral ships, in certain cases, in time of war. See Holliday's Life of Ld. Mansfield, vol. 2. pp. 424, &c. and Collectanea Juridica, 1 vol. 129 See post, Appendix. See also the case of Viveash v. Becker, 3 Maule and Sel. 284. in which Lord Ellenborough quotes several of these authors, to ascertain the law of nations upon the privilege of consuls.

demand restitution; and if not complied with, then letters of marque and reprisal may be issued, or the matter may be the just ground of declaring war. (1)

Of commercial treaties, and by what principles governed.

The same liability to perpetual fluctuation, which makes it impossible to find the *customary* law declared *express* and *entire*, in any authentic collection, makes it also impossible to find the *conventional* law explicitly and comprehensively declared for every breach of an existing condition, every fresh compact, every eruption of hostility, will usually dissolve the frame and very existence of a treaty. There are, however, some generally acknowledged principles to be observed in the formation of treaties, and some rules of construction established, which claim our particular notice. It has been observed, that in ancient times the knowledge of this conventional law was thought one of the greatest praises that could be bestowed on a name loaded with all the honours that eminence in the arts of peace and war can confer; and that the knowledge of them is still necessary, not only to negotiators and statesmen, but to merchants and others, in various situations in which they may be placed (2). We will therefore consider the general principles on which a treaty may be framed, its objects, and the rights and obligation it creates, and how they may be annulled.

It is observable that a commercial treaty, definitely setling and encouraging the transactions in trade between the subjects of two or more states, must be one of the most effectual modes of increasing and securing the welfare of each state; and this was so felt, even in the earlier times, that a commercial treaty is stated by Lord Coke to be one of the few compacts that may with propriety be made with an infidel (3). The mere general liberty of trade, such as it is acknowledged at present in Europe, being too vague to secure to a nation all the advantages that it is necessary it should derive from its trade, commercial powers have been obliged, or have found it their interest, to have recourse to treaties for their mutual

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(1) See several authorities, Com. Dig. Prerogative, B. 4. 2 Chalmer's Col. Op. 252—327. 330—333. See post, as to letters of marque and reprisal.

(2) Mackintosh Dis. L. of Nations, 64, 65.

(3) 4 Coke's Inst. 155. 2 Ward's L. Nat. 325, 6.

benefit (1); and sometimes, resulting from able negotiation, treaties are obtained more favourable to one country than the other (2). The number of these treaties is considerably augmented since the sixteenth century; and it is now usual, amongst all the states of Europe, to enter into express treaties, which particularly point out the terms on which their mutual intercourse shall be conducted (3). The use, the lawfulness, and the obligation of commercial treaties, are thus generally laid down by Vattel (4) As each nation is only so far obliged to carry on commerce with others as she can do it without being wanting to herself, and as the whole ultimately depends on the judgment that each state may form of what it can and ought to do in particular cases, nations cannot count on any thing more than generalities, such as the inherent liberty of each to carry on trade, and, moreover, on imperfect rights, which depend on the jndgment of others, and consequently are ever uncertain; wherefore, if they wish to secure to themselves any definite and constant advantages, they must procure them by treaties.

Since a nation has a full right to regulate herself in commercial affairs by what is useful or advantageous to her, she may make such commercial treaties as she thinks proper; and no other nation has a right to take offence, provided those treaties do not affect the perfect rights of others. If, by the engagements contracted, a nation unnecessarily, or without powerful reasons, renders herself incapable of joining in the general trade which nature recommends between nations, she trespasses against her duty; but the nation being the sole judge in this case, other nations are bound to respect her natural liberty, to acquiesce in her determination, and even to suppose that she is actuated by substantial reasons. Every commercial treaty, therefore, which does not impair the *perfect* right of others, is allowable between nations, nor can the execution of it be lawfully opposed; but those commercial treaties alone are in themselves just and commendable which pay to the general interest of mankind as great a degree of respect as is possible

(1) Marten's L. of Nat. 153. 3 Smith's W. of Nat. 26.

(2) 3 Smith's W. of Nat. 26, 27. Tucker on Trade, 35, 36. Sir J. Child on Trade, 160.

(3) Id. ibid. and see post, Appendix, for the several subsisting commercial treaties.

(4) Vattel, pp. 145—147.

and reasonable in the particular case. As express promises and engagements should be inviolable, every wise and virtuous nation will be attentive to examine and weigh a commercial treaty before she concludes it, and to take care that she be not thereby engaged to any thing contrary to the duties which she owes to herself and others.

Nations, may in their treaties, insert such clauses and conditions as they think proper; they are at liberty to make them perpetual or temporary, or dependent on certain events; it is usually most prudent not to engage for ever, as circumstances may afterwards intervene by which the treaty might become very oppressive to one of the contracting parties. So a nation may confine a treaty to the grant only of a precarious right, reserving to herself the liberty of revoking it at pleasure.

When once a nation has entered into engagements by treaty, she is no longer at liberty to do, in favour of others, contrary to the tenor of the treaty, what she might otherwise have granted to them agreeably to the duties of humanity, or the general obligation of mutual commerce; for she is to do for others no more than what is in her power; and having deprived herself of the liberty of disposing of a thing, that thing is no longer in her power: therefore, when a nation has engaged to another, that she will sell certain merchandize or produce to the latter only,—as, for instance, corn,—she can no longer sell it to any other: the case is the same in a contract to purchase certain goods of that nation only. But, it will be asked, how and on what occasions a nation may enter into engagements which deprive her of the liberty to fulfil her duties to others?—The answer is, that as the duties we owe to ourselves are paramount to those we owe to others, if a nation finds her safety and substantial advantage in a treaty of this nature, she is unquestionably justifiable in contracting it; especially as she does not thereby interrupt the general commerce of nations, but simply causes one particular branch of her own commerce to pass through other hands, or ensures to a particular people certain things of which they stand in need. If a state which stands in need of salt can secure a supply of it from another, by engaging to sell her corn and cattle only to that other nation, who will doubt but she has a right to conclude so salutary a treaty?

In this case her corn or cattle are goods which she disposes of for supplying her own wants (1). But from what we have observed, engagements of this kind are not to be entered into without very good reasons. However, be the reasons good or bad, the treaty is still valid, and other nations have no right to oppose it. Every one is at liberty to renounce his right; a nation may therefore lay a restriction on her commerce in favour of another nation, and engage not to traffic in a certain kind of goods, or to forbear trading with such and such a country, &c.; and, in departing from such engagements, she acts against the perfect right of the nation with which she has contracted, and the latter has a right to restrain her. The natural liberty of trade is not hurt by treaties of this nature; for that liberty consists only in every nation being unmolested in her right to carry on commerce with those that consent to traffic with her; each one remaining free to embrace or decline a particular branch of commerce, as she shall judge most advantageous to the state. Nations not only carry on trade for the sake of procuring necessary or useful articles, but also with a view to make it a source of opulence or national defence. Now, whenever a profit is to be made, it is equally lawful for every one to participate in it; but the most diligent may lawfully anticipate the others, by taking possession of an advantage which is open to the first occupier; he may even secure the whole entirely to himself, if he has any lawful means of appropriating it. When, therefore, a particular nation is in sole possession of certain articles, another nation may lawfully procure to herself, by treaty, the advantage of being the only buyer, and then sell them again all over the world. And as it is indifferent to nations from what hand they receive the commodities they want, provided they obtain them at a reasonable price, the monopoly of this nation does not clash with the general duties of humanity; provided that she does not take advantage of it to set an unreasonable and exorbitant price on her goods. Should she, by an abuse of her monopoly, exact an immoderate profit, this would be an offence against the law of nature; as, by such an exaction, she either deprives other nations of a necessary or agreeable article, which

(1) See an instance of such a treaty with Portugal by Mr. Methuen, in 1703, to buy all their wine, in exclusion of France. Tucker on Trade, 35, 36. Sir J. Child on Trade, 160. 3 Smith's W. of Nat. 27. 29. Marten's L. N. 151, 2.

nature designed for all men, or obliges them to purchase it at too dear a rate. Nevertheless, she does not do them any positive wrong, because, strictly speaking, and according to external right, the owner of a commodity may either keep it or set what price he pleases on it. Thus the Dutch, by a treaty with the king of Ceylon, wholly engrossed the cinnamon trade; yet, whilst they kept their profits within just limits, other nations had no right to complain. On this question,—on the right of purchasing a monopoly,—the opinion of Grotius accords with that of Vattel. (1)

The *object* of a commercial *treaty* is usually threefold: 1st, The definition of commercial rights during peace; 2dly, The arrangement of commercial rights in case of hostility between the contending parties; and 3dly, The arrangement of the commercial rights of either contracting party who may remain neuter while the other contracting party is engaged in a war with a third power. (2)

As to the *first* point, namely, the definition of commercial rights during peace, it is the practice to settle the *privileges* granted by each state to the subjects of the other to ascertain the rights of those subjects belonging to either state who shall become resident on the other's territory, as well their personal rights as the rights relating to their property; such as their liabilities to or exemptions from imposts, confiscations, and sequestrations; and to specify the descriptions of merchandize of which the exportation or importation will be allowed, with the advantages relating to customs, tonnage, and so forth. A tarif, or enumeration of articles, is frequently added; but it is not necessarily in force for the whole duration of the treaty (3). There is also usually a stipulation as to the admission and residence of consuls.

As to the *second* point, namely, the arrangement of commercial rights in case of hostility between the contracting parties, the principal objects of treaties are generally to obtain, for the subjects of either state residing on the territory of the

(1) Grotius, 158. Sir J. Child, 160.

(2) Marten's L. of Nat. 154.

(3) Marten's L. of Nat. 154, 155.

other, an exemption from seizure of their persons and properties, or compensation for such seizure, or mode of redress (1); and to fix the time that shall be allowed them (usually twelve months) for removing themselves and their effects; or to define the conditions on which they may remain there during the war (2): and sometimes treaties have been made to permit commerce in a particular state even during war. (3)

As to the *third* point; namely, the arrangement of the commercial rights of either contracting party who may remain neuter while the other contracting party is engaged in a war with a third power; the aim of treaties is usually to exempt the vessels of the neutral from embargo; to specify the merchandizes which are to be deemed contraband of war, and the penalties for dealing in them; to determine the mode in which vessels shall be searched at sea; and to point out what descriptions of traffic shall be considered as entitled to neutral immunities. The mode of framing these and other stipulations usually inserted in commercial treaties, will be found by a perusal of the treaties towards the close of the last century (4), and of those which at present regulate the commerce of Great Britain with other states, and which are given in the Appendix to this work. (5)

It is laid down and established by argument, with analogy to the law of contracts, that five things are essential to the validity of a treaty. 1st, That the parties to it have power to consent; 2dly, that they have actually consented; 3dly, that they have consented freely; 4thly, that the consent has been mutual, and not under a mistake; and 5thly, that the execution of it be possible. (6) But the king cannot by any treaty make his subjects liable to other punishments for the breach of a treaty, than what the laws of their own territory do (7). If a treaty be

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(1) 3d Article of Treaty of Madrid. 2 Chalmer's Col. Op. 327.

(2) Marten's L. of Nat. 155. See 2 Ward's L. of Nat. 357, 358. Treaty between Great Britain and France, A. D. 1786. Art. 2. 4 Anders. Hist. Com. 614. Treaty between Great Britain and Russia, 1766. Art. 12. 4 And. 94.

(3) 2 Ward's L. of Nat. 358.

(4) See Anderson's History of Commerce, vol. 4. Index, Treaties. Reaves's Lex Merc. Index, Treaties; and Montefiore's Commercial Dictionary, tit. Treaties; and see Hawkesbury's Treaties, 3 vols. by Jenkinson.

(5) See post, vol. 3.

(6) Marten's L. of Nat. 48—52. 4 Inst. 152.

(7) 2 Chalmer's Col. Op. 337.

perfect in all these respects, there is one broad principle which applies to all treaties; and there can be little necessity to comment upon it, for it is contained in this almost self-evident maxim, that every nation is, at every period, bound to obey the conventional law as at that period it exists (1). Thus Lord Kenyon, in giving judgment in the case of Bird and Appleton (2), lays it down as an established proposition, that the judgments of the courts of admiralty are to proceed on the known *jus gentium*, or on the treaties between particular states; that such treaties do not alter the *jus gentium* with respect to the rest of the world; but, as between those particular states, they are considered *as engrafted* on the *jus gentium*. The *conventional* law must always be sought in the respective treaties out of which the immediate right or duty in question may arise. The inherent rights of nations, that is to say, the rights which they enjoy by the *natural* and *voluntary* law, cease, like those of individuals, *only* by their *own consent* or their *own delinquency*. By their own consent, expressed or implied, as by *treaties*, or by long acquiescence in *customs*; in which cases however the right revives on the lawful termination of the *treaty*, or on giving notice of an intention to be bound no longer by the *custom*. By their own *delinquency*, as by the commission of some injury to other states, which calls for atonement of a penal nature. In all these cases the cessation of a nation's rights takes place without injustice to the nation; in all other instances it becomes an indefensible outrage.

Several *rules of construction* of treaties have been elaborately laid down (3); and in a learned opinion upon this subject, it has been well observed, that treaties being in their nature compacts superseding the common usage, which is, strictly speaking, the law of nations, by particular stipulations, are to be argued upon the footing of all obligations which arise from contract, expressed or tacit, whether *quasi ex contractu*, or necessarily implied by general words of comprehension; and the principles of the civil law *de obligationibus*, which is the law admitted by all nations in Europe, by most in their domestic and by all in national questions, must be allowed to arbitrate in deciding the validity, existence, and meaning of a public treaty, by the same rules and reasonings as when applied to any other contract of private life.

(1) Martens's L. of Nat. 47.
(2) 8 Term Rep. 567.
(3) Vattel, L. Nat. 244—274.

Words or characters are merely used to convey, by marks or sounds, the ideas of consent, and to preserve the memory of compacts: now the end thus being principally to be considered, and the means being regarded only as declarative of the end, if by any other means than by strict words a contract is implied, it is undoubtedly valid whenever there appears, from any acts or reasonable interpretations of signs, an acknowledged consent, and equitable foundations of contracting, these circumstances making the very substance of a contract (1). Therefore the rules of customary contracts between private individuals may in general be called in aid (2). However, in debating any question upon treaties arising between nation and nation, in the age we live in, it is necessary to keep in view the general state and condition of the contracting powers, from whence the arguments of public law can only be drawn with any just decision (3). It has also been considered that a general commercial treaty, not limited by its terms to a particular time, is only suspended by a war, and that upon the return of peace it will tacitly revive by implication, unless there be an express declaration to the contrary (4). In the great case of Marryatt v. Wilson, upon the construction of the treaty between Great Britain and the United States, in error in the Exchequer Chamber, Eyre, Ch. J., after observing that a treaty should be construed liberally and consistent with the good faith which always distinguishes a great nation, said, that courts of law, although not the expounders of a treaty, yet when it is brought under their consideration incidentally, they must say how the treaty is to be understood between the parties to the action, and in doing which they have but one rule by which to govern themselves. We are to construe this treaty as we would construe any other instrument, public or private; we are to collect from the nature of the subject, from the words and the context, the true intent and meaning of the contracting parties, whether they are A. and B., or happen to be two independent states. (5)

(1) Sir James Marriot's Opinion on the duration of the Treaty of Neutrality in 1686, in Chalmer's Collect. of Opinions, vol. 2. 345, 346.

(2) See post, as to this construction.

(3) 2 Chalmer's Col. Op. 347.

(4) 2 Chalmer's Col. Op. 344—355.

(5) Per Eyre, Ch. J. in Marryatt v. Wilson, 1 Bos. & Pul. 436—439.

With respect to the right of a nation to *annul a treaty* to which it was a party, it has been observed, that treaties of alliance, being nothing more than stipulations of mutual advantages between two communities in favor of each other, ought to be considered in the nature of a bargain; the conditions of which are always supposed to be equal, at least in the opinion of those who make it; he therefore who breaks his part of the contract destroys the equality or justice of it, and forfeits all pretence to those benefits which the other party hath stipulated in his favor (1). A treaty may be broken or determined by levying war, or by ambassador or herald (2); and in former times it was even considered that a general prohibition against the importation, from a state in amity, of any of her goods, amounted to a breach of a treaty. (3)

In Great Britain, the sole power of making treaties, as well as of declaring war, is vested absolutely in the crown (4); though, as observed by Lord Hale, it always succeeds best when done by parliamentary advice (5); and by such treaty the private property or right of a subject may be bound: As if A. bound to B., a subject of England, during a war between this kingdom and Denmark, pays the debt to the king of Denmark by order of the state there; and by the article of peace, all monies paid by the subject of the one prince shall be quit by monies paid by the subject of the other, and the parties that paid to either of the king's orders, shall be discharged against the creditor; if B. sues for such debt, A. shall have relief in equity (6). But his majesty cannot by any treaty make his subjects liable to other punishments than what the laws of this kingdom do (7). All leagues, it is said, ought to be upon record, enrolled in chancery, whereby every one may know who are in amity or enmity with the king or not (8). The violation of a treaty agreeing to punish with extreme rigour such as, by colour of commissions

(1) See Discourse on Conduct of Great Britain to Neutral Nations, in Hawkesbury Treaties, vol. 1. xxxi.

(2) 4 Inst. 152. Com. Dig. Prerogative, B. 3.

(3) 2 Rol. Ab. Prerogative of the King, M. l. 5. Com. Dig. Prerogative, B. 3.

(4) 7 Coke's Rep. 25 *b*. Com. Dig. Prerogative, B. 3, 4. 2 Chalmer, Collect. Op. 249.

(5) Hal. Hist. P. C. 159. Bac. Ab. Prerogative, D. 4.

(6) 1 Ch. Ca. 123. 173. Com. Dig. Prerogative, B. 3.

(7) 2 Chalmer's Coll. Op. 337.

(8) 4 Inst. 152. 9 Co. 31 *a*. Com. Dig. Prerogative, B. 3.

from enemies to the allies, shall take arms against the king's peace and treaties proclaimed, and spoil the king's allies, has been considered not to be a levying of war against the king, and punishable by death, but that it is a crime against his majesty's treaties of peace, and the strict proclamation he hath pleased to set forth to enjoin the due observance of them; and it is also an offence against the law of nations; and by the civil law it is *crimen læsæ majestatis;* but by the law of England it is no more than a confederacy against his majesty's crown and dignity, and punishable by the statute for the trial of piracy (1). However, all offences contrary to amity or league are considered as a contempt of the king, an injury to the whole kingdom, and punishable as a high misdemeanor. (2)

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(1) 2 Chalmer's Col. Op. 329, 330. See Com. Dig. Prerogative, B. 3.

(2) 2 Rol. Ab. Prerogative, M. p. 174. l. 15. Com. Dig. Ambassador.

CHAP. III.

Of Consuls.

HAVING taken this general view of the law of nations affecting commerce, we will now proceed to inquire how the commerce of any country may be legally affected by the acts of a foreign state, whether during peace or war; and especially by the appointment of consuls. There are no acts by which the commerce of a country is more materially affected than by the public facilities which may be granted, or public obstacles which may be opposed, to the daily and practical course of business in foreign parts. And in order therefore, as far as possible, to advance such facilities and remove such obstacles, almost every nation has, in modern times, usually taken care to procure from the foreign states the permission of maintaining within the territories of each government a commissioner or agent for commercial affairs, termed a *consul*.

Of the origin of the office of consuls.

The *origin* of the appointment of consuls has been ascribed to the necessity for extraordinary protection in some branches of commerce formerly carried on with barbarous and uncivilized nations; and it was not usual for the more civilized states to employ such commercial agents until about the end of the fifteenth or beginning of the sixteenth century (1). It appears to have been about the twelfth century that this office was first instituted; but the consuls of that time were not, as at present, commercial officers of one country residing in another, but were merely mercantile judges established at home. Muratori tells us, in his Italian antiquities of the middle age (2), that they were appointed in some of the most opulent states of that time, such as Pisa, Lucca, Genoa, and Venice; and it was in imitation of this domestic practice, that several powers of Europe afterwards began to stipulate, in their treaties with the pagan governments, for the liberty of maintaining consuls in the ports subject to those governments, in order to watch over the interests of their subjects trading there, and to judge and determine on differences arising amongst

(1) 3 Smith's W. of Nat. 252. Ævi, vol. 2. diss. 30. p. 881. 37.
(2) Murat. Antiq. Ital. Mædii 89.

them touching commercial affairs, and sometimes even others. The first mention of a consul of merchants in any English record, is in A. D. 1346 (1); and the first appointment of a consul for the merchants of England, in any of the countries within the Mediterranean, was in A. D. 1484, when king Richard, at the request of the English merchants, appointed a merchant of Florence to be consul of the English merchants at the city of Pisa and adjacent countries, and delegated to him the power of hearing and summarily determining all disputes between English subjects in those parts, and doing all other things pertaining to the office of a consul, with a right to receive one and a quarter *per cent.* on all sales and purchases of the English in the city and port of Pisa (2). In the fifteenth century this practice of sending consuls into foreign states appears to have become general in Europe; but it has been observed, that even at this day the custom of receiving them cannot be looked upon as universally established; besides, the right of these consuls, where they are admitted, differ very widely in different states; almost all the consuls who are sent out of Europe exercise a pretty extensive jurisdiction over the subjects of their sovereign. In Europe there are some places where the consuls exercise a civil jurisdiction, more or less limited, over their fellow-subjects residing there; in others they can exercise no more than a voluntary jurisdiction; and in others their functions are confined to watch over the commercial interests of the state, particularly the observation of the treaties of commerce, and to assist with their advice and interposition those of their nation whom commercial pursuits or connections have led them to the place for which they are named. (3)

Vattel observes, that amongst the modern institutions for the advantage of commerce, one of the most useful is that of consuls, or persons residing in the large cities, and especially the seaports, of foreign countries, with a commission to watch over the rights and privileges of their nation, and to decide disputes between her merchants there; and when a nation trades largely with a country, it is requisite to have a person charged with such a commission: and as the state which allows of this commerce Utility of the office.

(1) 1 Macpherson's Ann. Com. 336, in notes.

(2) Id. 705.

(3) Marten's L. of Nat. 156, 7. Montef. Com. Dic. tit. Consuls.

must naturally favour it, for the same reason, also, it must admit the consul (1). The object and utility of this mercantile officer has been thus described in an able work upon the subject (2). "L'objet et le but principal de leur mission de leur éstablissement est, de veiller aux intérêts du commerce national, d'imaginer et de suggérer les moyens de l'améliorer et de l'éntendre dans les contrées ou ils resident, de protéger et de défendre les négocians qui y trafiquent; d'avoir l'oeil sur l'accomplissement et l'observation des traités, sur les atteintes et les infractions qu'on leur donne et fait, d'en porter au souverain des plaintes, de faire des remonstrances à ce sujet, de solliciter l'exécution de ce dont ou est convenu, de garantir les négocians et les gens de mer de leur nation de toutes les avanies et les vexations, de les assister et aider de leurs avis et de leurs conseils, de les maintenir dans la jouissance de leurs privilèges et de leurs immunités, de régler, d'ajuster, de terminer leurs affaires et leurs différens, de connoitre de leurs contestations, de les juger et décider, &c. On voit par cela de quelle etendue et de quelle importance est la commission dont les consuls sont ordinairément chargés, et quels sont les services que l'etat en attend, et quelles facultés leur sont communément attribuées. Il faut cependant observer que le pouvoir et les droits des consuls ne sont pas dans tous les pays de la même étendue. Les traités les modifient et les limitent différement. Pour parvenir à fixer les principes en cette matière, il faut feuilleter, parcourir, consulter les traités de commerce, en comparer les stipulations, en faire un précis, en tirer et en inférer des consequences et des résultats, et asseoir sur ces conclusions les idées et les principes." In France and in Spain the office of consuls is of two descriptions; domestic, having judicial power to settle and determine disputes between their own merchants, and traders; and foreign, in order to watch over the commercial interests of their own nation in a foreign state. But in all its commercial treaties the British government has stipulated for but little judicial authority for their consuls, except in those with the Barbary states (3). And in England consuls have no ju-

(1) Vattel, b. 2. c. 2. s. 34. p. 147. Viveash v. Becker, 3 M. & S. 292. See also Beawes's L. Mer. vol. 2. p. 416. Pardessus, 4 tom. 136. Warden on Consuls, per tot. as to the utility of this office.

(2) Essai sur les Consuls par Mrs. De Steck, a Berlin, 1790, page 22.

(3) Warden on Consuls, 252. 260, 1. Pardessus, 4 tom. 160.

dicial power; and there is no consular establishment within the kingdom derived from our own laws and constitution, to settle and adjust matters of dispute and controversy in that easy, unexpensive, and summary manner, that some other nations have judged requisite to institute (1). Many observations and arguments have been made, and books written on the expediency of extending the power of English consuls in this respect. In a modern work there are some able observations on the right of a sovereign to require his subjects in foreign parts to submit to the jurisdiction and judicial authority of his consul there, and the expediency of such a regulation (2). It is however there admitted that a sovereign cannot invest a consul with judicial power, even over his own subjects, in a foreign country, so as in that country to enforce the judgment according to the municipal law, but that nevertheless the decision of a French consul in England, in questions between French subjects, will have effect in France (3). And it is there laid down, that in all christian countries by, as it were, common consent, with reference to the administration of penal laws, the prosecution of crimes against foreigners is left entirely to the municipal tribunal of the place where it is committed (4); and it is admitted that at all events a French consul cannot have a criminal jurisdiction in a foreign country, unless it be expressly given; and that there is no instance of such a power in any Christian country (5). It is laid down, however, that an exception prevails with reference to shipping concerns. (6)

Besides the advantage derived from the establishment of consuls in their protection of the subjects of their nation in a foreign country, many other advantages may result to the nation at large. A consul being always on the spot, and conversant with the practice of trade, and with the traders of foreign nations as well as his own, has greater opportunities than an ambassador, whose time is generally occupied with political business of far higher importance, of observing and pointing out to his own government the progress of his country's trade with the foreign state, and the measures to be adopted to facilitate the interests of the former, and may frequently prevent contests between the sub-

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(1) Postl. Dict. tit. Consuls.
(2) Pardessus, 4 tom. 157 to 163.
(3) Id. 164, 5.
(4) Pardessus, 4 tom. 183.
(5) Id. 184.
(6) Id. 185.

jects of the two states, which might otherwise cause a public war (1). Nor are the advantages resulting from the consular office confined merely to trade; for an intelligent consul will acquire and communicate to his nation many improvements in all the various departments of knowledge. In France, even in the midst of revolution, at the request of the French committee of public instruction, the department of foreign affairs enjoined their consuls to keep up a regular correspondence on subjects of science, manufactures, and arts (2). It has been observed in an able modern treatise, by an American consul (3), that the English government, struck with the political and commercial advantages of consular establishments, selected for their direction men of talents and respectability, naval or military officers, with a salary suitable to their situations, whose particular duties are to support the dignity and privileges of their nations; to exercise a certain jurisdiction over English commerce and navigation; and to furnish the government with prompt information on every subject connected with its interest. And in a late publication it has been observed, that if England had three times her present number of consuls in some parts of the world, and especially in the Mediterranean, it would be of increased advantage to the country. (4)

Sometimes *consuls general* are appointed, who are to officiate for several places at the same time, or else they are placed at the head of several consuls; in other respects their functions, as well as those of their own consuls, differ but little from those of simple consuls (5). The vice-consul in France is bound to render to his principal an account of the proceedings in his office, independently of that rendered to the minister (6). Consuls may also in some cases appoint agents of commerce, whose duty it is to render all the good offices they can to the subjects of their state, and to correspond with the consul appointing him and exe-

(1) Postl. Dict. tit. Consuls.

(2) Warden, 28, 29.

(3) Warden on the Origin, Nature, &c. of Consular Establishments, p. 241. This work was published in English at Paris in A. D. 1813, and translated into French by Monsieur Barrere, French consul at Corogne, A. D. 1815.

(4) Reflections on the Commerce of the Mediterranean, &c. by Jno. Jackson, Esq. F.S.A. See also Warden on Consuls, 251.

(5) Marten's L. Nat. 158, 9. Pardessus, 4 tom. 137, 8.

(6) Pardessus, 4 tom. 138.

cute his orders connected with his commission (1). In France there is a regular arrangement for the education of vice-consuls, but in this country there is no public establishment of that nature (2).

Of the appointment of consuls.

The right to send consuls into a foreign territory is founded on custom or express treaty (3); but there being no absolute and perfect obligation to receive a consul unless it has been expressly agreed upon, the nation that wishes to secure this privilege must procure that right by the commercial treaty itself; and the mere circumstance of a commercial treaty having been entered into, does not imply a right to require a resident consul in the foreign state (4). These treaties vary between the different countries; in the treaty between England and France concluded in 1786, it was stipulated, "that it should be permitted to their Majesties respectively to establish in the kingdoms and countries of each other, for the advantage of the subjects who trade there, national consuls, who shall enjoy those rights, immunities, and freedom which belong to them in virtue of their duties and functions, and they shall afterwards agree concerning the places where the said consuls may be established, and also concerning the nature and extent of their functions." And on the 7th of January 1787, a convention was thereupon executed, containing the following article: "Their Majesties having stipulated, by the 43d article of the said treaty, to determine the nature and extent of the functions of consuls, it is agreed that the convention relative to this subject shall be framed in the space of two months, and that in the meantime the consuls general, consuls, and vice-consuls shall act conformably to established usages concerning consulates in the respective states of the two sovereigns; and that they shall have all the privileges, rights, and immunities, which their quality supposes, and which are given to the consuls general, to the consuls and

(1) Pardessus, 138, 9.

(2) Id. 4 tom. 138. Warden on Consuls, 185, 6.

(3) France and Holland agreed expressly, in their treaty of 1697, art. 39, and 1739, art. 40, *not* to send consuls; but from custom, contrary to these treaties, those two powers continued to send them. Marten's L. of N. 156.

(4) Vattel, b. 2. c. 2. s. 34. pp. 147, 8. Pardessus, Cours de Droits Commercials, tom. 4. p. 137. 2 Ward's L. of N. 331. See treaties reserving power to appoint consuls, 4 Ander. Hist. Com. 626. 649; and post, vol. 3.

vice-consuls of the most favored nations." In the convention of commerce between Great Britain and the United States of America of the 3d July 1815, it is declared, "that it shall be free for each of the two contracting parties respectively to appoint consuls for the protection of trade, to reside in the dominions and territories of either party; but before any consul shall act as such, he shall in the usual form be approved and admitted by the government to which he is sent: And it is hereby declared, that in case of illegal and improper conduct towards the laws or government of the country to which he is sent, such consul may either be punished according to law, if the laws will reach the case, or be sent back, the offended government assigning to the other the reasons for the same: And it is hereby declared, that either of the contracting parties may except from the residence of consuls such particular places as such party shall judge fit to be so excepted." In the recent treaty between Sweden and America, ratified on the 24th July 1818, it is thus stipulated: "The high contracting powers mutually grant the right of maintaining consuls, vice-consuls, or agents, in each other's ports and commercial towns, who shall enjoy full protection and receive every assistance necessary to enable them duly to execute their functions; but it is hereby expressly declared, that in the case of illegal or improper conduct against the laws or government of the country to which any such consul, vice-consul, or agent is sent, he may be punished conformably to the laws, be deprived of his functions, or dismissed by the offended government, the said government giving an account of the transaction to the other; it being however well understood, that the archives or documents relative to the affairs of the consulate shall be subject to no examination, but shall be carefully preserved, being placed under the seals of the said consul, and of the authority of the place where he shall have resided. The consuls or their substitutes shall, as such, have the right of acting as judges or arbiters in all cases of differences which may arise between the captains and crews of the vessels of the nation whose affairs are entrusted to their care. The respective governments shall have no right to interfere in these sort of affairs, except in the case of the conduct of the crews disturbing public order and tranquility in the country in which the vessel may happen to be, or in which the consul of the place may be obliged to call for the intervention and support of the executive power in order to cause his decision to be respected; it being however well under-

stood, that this sort of judgment or arbitration cannot deprive the contending parties of their right of appealing, on their return, to the judicial authorities of their country." The other treaties respecting consuls will be found in the last volume.

Where the right of sending consuls to reside in their respective dominions is expressly stipulated in commercial treaties subsisting between the crown of Great Britain and the states to whom they are sent, either state may object to the particular person appointed to the office, and by their ambassador make requisition for the appointment of another, assigning proper reasons for their rejection of the first; but they cannot reject the king's commission: whereas those potentates with whom we have no commercial treaties stipulating for the appointment of a consul, may not only refuse the person but the commission itself, without violation of the peace and amity subsisting between the powers so refusing and this country; for the law of nations does not include this appointment, though it is usual to grant permission. And this difference is material in practice; for the consul, whose residence is founded upon a treaty, may proceed to much greater lengths in the exercise of his authority, than he who is only admitted by permission; for in the latter case many points, however clear, will be frequently disputed with such permissive consul by the magistracy of the place where he resides (1). The form of the English commission to a consul also varies when it is made under a treaty, from that of a commission to a mere permissive consul; the first expressly refers to the terms of the treaty, and invests the consul with all the jurisdiction and privileges declared by the treaty itself, as well as those given by the practice of the different states; whereas the latter is more general, and leaves open to discussion what may be that jurisdiction and those privileges.

Formerly the English consul was elected by merchants from among the members of their own association, and was recommended by them to the secretary of state, who presented the nomination to the king, who under his sign manual issued a commission, which explained the nature and object of the appointment; but in more modern times the appointment has been

(1) Beawes's Lex Merc. vol. 2. 416, 417. Warden, 241, 2.

confided to the secretaries of state for the southern and northern provinces. The consuls of the southern kingdoms of Europe are under the direction of the former, and those of the northern under that of the latter; with the exception of a few, over which certain commercial corporate companies have an unlimited control (1). The commissions granted to British consuls were formerly issued in Latin, but are now in English. The former of such commissions, and some of those issued by foreign states, will be found in the Appendix (2). In some cases letters of instruction accompany the commission, and direct some of the more particular duties to be observed. (3)

The nomination and appointment of the consul is to be *notified* to the sovereign of the state where he is to reside, according to the forms settled by the treaty which has authorized his establishment, or those which usage has introduced, in order to obtain from such sovereign a written *declaration*, approbation, barat, or *exequatur*, (des lettres de'exequatur) of the authority which recognizes his character, and authorizes him to exercise his functions (4). Such declaration of the sovereign is addressed to all his subjects, and recites the appointment of the foreign state, and that the sovereign having approved of the consul as such, states his will and pleasure and command that all his subjects do receive, countenance, and, as there may be occasion, favourably assist the consul in the exercise of his place, giving and allowing him all the privileges, immunities, and advantages thereto belonging; and in England the same is subscribed by the secretary of state (5). It is said, that in general the consul should cause his appointment and acceptance to be *published* in an assembly of merchants, and should register the same (6): but in England there is no register at the secretary of state's office, of the appointment, as if the consul were a public minister. (7)

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(1) Beawes, vol. 2, p. 416. Warden, 239—241. In France consuls are named by the king out of the vice-consuls, and the vice-consuls out of the eléves vice-consuls. Pardessus, 4 tom. 143, 4.

(2) Post, vol. 3. 2 Beawes, 417, 418. Viveash v. Becker, 3 M. & S. 286.

(3) Viveash v. Becker, 3 M. & S. 287.

(4) Pardessus, 4 tom. 144. Warden, 104. 181.

(5) See form, post, vol. 3. and Viveash v. Becker, 3 M. & S. 287.

(6) Pardessus, 4 tom. 145, 6.

(7) Viveash v. Becker. 3 M. & S. 290.

Of the qualification, duties, and office of a consul.

As the affairs of our trade, and the interests, rights, and privileges of our merchants and seamen in foreign countries, are ordinarily left to the conduct of our British consuls, they cannot be too well qualified for this office. He should be well acquainted as well with the general commercial law of nations as with the treaties and local usages of the country where he is to reside, and his education and knowledge should enable him to take an enlarged view of the commercial interests of his own country, and by his own dignified and circumspect conduct impress the foreigners, with whom he may have intercourse, with a due respect for the nation of whose commercial interests he has the care (1). The instructions of an enlightened consul general to his colleagues contains this observation: " In a foreign country Frenchmen are generally judged of by their consuls, and the latter by their conduct; when therefore you reflect that it depends on us to cause the French name to be cherished and respected, you will feel all the dignity of your mission:" (2) To be useful to his country in arts, sciences, and manufactures, he should have no commercial engagements: services of this kind cannot be expected from, nor can they be performed by him, whose mind is absorbed in the pursuit of gain. He must not only desire, but have time to acquire and communicate knowledge. His conduct and usefulness will always be influenced by the circumstances in which he is placed. If he have not a regular and sufficient salary, he will be obliged to seek support as a merchant or factor, and his attention will be constantly directed more to his own private advantage than the general good of his country's commerce; and though he may not be tempted to act fraudulently, yet he will necessarily be negligent in the due performance of his office. Personal interest blinds men with regard to their public duties (3). The French strictly enjoin their consuls in all foreign countries not to carry on any commerce, under penalty of dismission from their office; but it has been observed, that the British consuls, contrary to sound policy, are still permitted to trade in all the ports where it is not prohibited, as it ought to be, by the sovereign of the country (4). However, it is

(1) Warden on Consuls, 21, &c. Postl. Dic. tit. Consuls.

(2) Per M. de Beaujour. Warden on Consuls, 209.

(3) Beawes's L. Merc. vol. 2, p. 416. Marten on Consuls, 20. 21. 239, 240. Pardessus, 4 tom. 141. Warden on Consuls, 20, 21. 90. 196.

(4) Beawes's L. Merc. vol. 2.

established that the character of consul does not protect that of merchant when united in the same person (1). An exception may be allowed, when it is not probable that the duties of the office will occupy more than a very small part of the time and attention of the consul. On still stronger grounds of policy, a consul must not accept of any commission or employment from the foreign state where he is to reside, which might diminish his zeal for, or at least prevent his attention to, the commercial interests of the country for which he is acting as consul (2). So the functions of a consul require that he be not a subject of the state where he resides, as in this case he would be obliged in all things to conform to its orders, and thus not be at liberty to perform the duties of his office (3). But, contrary to this principle, it is not unusual to appoint a native of the foreign state to be the consul there (4); as in Portugal, Spain, and Italy, where there is a scarcity of British subjects, and in which it has been customary for the consul general to appoint natives of such countries to act as their deputies at inferior ports; but this, it has been observed, is an unwarrantable and impolitic practice (5).

A British consul, in order to be properly qualified for his employment, should take care to make himself master of the language used by the court and the magistracy of the country where he resides, so as to converse with ease upon subjects relating to his duties. If the common people of the port use another, he must acquire that also, that he may be enabled to settle little differences without troubling the magistracy of the place for the interposition of their authority, such as accidents happening in the harbour, of the ships of one nation running foul of and doing damage to each other. (6)

He is to make himself acquainted, if he be not already, with the law of nations and treaties, with the tarif or specification of

pp. 416—420. See observations in Warden, 237. Pardessus, 4 tom. 141.

(1) Per Sir Wm. Scott in The Indian Chief, 3 Rob. Rep. 27. Beawes, vol. 2. p. 420.

(2) Pardessus, 4 tom. 141.

(3) Vattel, b. 2. c. 2. s. 34. Beawes, vol. 2. pp. 418, 419. Pardessus, 4 tom. 144.; where an exception as to mere agents of commerce is allowed.

(4) Viveash v. Becker, 3 M. & S. 296. The Indian Chief, 3 Rob. Rep. 27.

(5) Beawes, vol. 2. pp. 418, 19.

(6) Beawes's L. Merc. vol. 2. p. 421. Viveash v. Becker, 3 M. & S. 296. Warden on Consuls, 245.

duties on articles imported or exported, and with all the municipal ordinances and laws. (1)

He must take especial notice of all prohibitions to prevent the export or import of any articles, as well on the part of the state wherein he resides, as of the government employing him, so that he may admonish all British subjects against carrying on an illicit commerce, to the detriment of the revenues, and in violation of the laws of either. And it is his duty to attend diligently to this part of his office, in order to prevent smuggling, and consequent hazard of confiscation or detention of ships, and imprisonment of the masters and mariners. (2)

It is also his duty to protect from insult or imposition British subjects of every description within his jurisdiction. If redress for injury suffered is not obtained, he is to carry his complaint by memorial to the British minister residing at the court on which the consulship depends. If there be none, he is to address himself directly to the court; and if, in an important case, his complaint is not answered, he is to transmit the memorial to his Majesty's secretary of state. (3)

When insult or outrage is offered by a British subject to a native of the place, the magistrate thereof complains to the consul, who should summon, and in case of disobedience may by armed force (4) bring before him the offender, and order him to give immediate satisfaction; and if he refuse, he resigns him to the civil jurisdiction of the magistrate, or to the military law of the garrison; nevertheless always acting as counsellor or advocate at his trial, when there is question of life or property. (5)

But if a British subject be accused of an offence alleged to have been committed within the dominion or jurisdiction at sea of their natural sovereign, it is then the duty of a British consul to claim cognizance of the cause for his sovereign, and to require the release of the parties, if detained in prison by the magistracy of the place, on any such accusation brought before them; and

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(1) Beawes, vol. 2. p. 421. Warden on Consuls, 245.

(2) Beawes, vol. 2. p. 421.

(3) Beawes, vol. 2. p. 421. Warden, 246.

(4) Pardessus, 4 tom. 161, 2. 185.

(5) Warden, 246. Beawes, vol. 2. p. 422. Pardessus, 4 tom. 161, 2.

that all judicial proceedings against them do instantly cease; and he is to demand the aid of the power of the country, civil and military, to enable him to secure and put the accused parties on board such British ship as he shall think fit, that they may be conveyed to Great Britain, to be tried by their proper judges (1). If, contrary to this requisition, the magistrates of the country persist in proceeding to try the offence, the consul should then draw up and transmit a memorial to the British minister at the court of that country; and if that court give an evasive answer, the consul should, if it be a sea offence, apply to the board of admiralty at London, stating the case; and upon their representation the secretary for the proper department will lay the matter before the king, who will cause the ambassador of the foreign state, resident in England, to write to his court abroad, desiring that orders may immediately be given by that government, that all judicial proceedings against the prisoner be stayed, and that he be released. (2)

The commanders of vessels, within ten days after their arrival in any port in the Baltic or Denmark, are to deliver upon oath to the consul of the port a true manifest of the cargo; and if not delivered, it is the duty of the consul to detain the clearance outwards, and the dispatch passport or bill of health of such vessel (3). And by a recent statute (4) it is provided, that in case the port where any ship shall clear or take her departure from, on her homeward voyage, or any port within the limits of the charter granted to the East India Company, for Great Britain, shall not be under the British government, then the British consul resident at such port is to demand from the captain his manifest, and to require him to authenticate the same on oath, and he is to transmit duplicates thereof to the commissioners of the customs in England or Scotland, as the case may require.

It is the duty also of British consuls to relieve all distressed British mariners, to allow them sixpence daily for their support, to send them home in the first British vessels that sail for England, and to keep a regular account of his disbursements, which he is to transmit yearly, or oftener if required,

(1) Beawes, vol. 2. p. 422. Pardessus, 4 tom. 161, 2. 185.

(2) See the case of Peter Horseman and his sailors, Beawes, vol. 2. p. 422.

(3) 17 Geo. 3. c. 41. s. 5. 18 Geo. 3. c. 40.

(4) 54 Geo. 3. c. 36. s. 11.

to the navy office, attested by two British merchants of the place: this is provided for by positive enactment (1). He is also to give free passes to all poor British subjects wishing to return home, directed to the captains of the king's pacquet-boats or ships of war, requiring them to take them on board. (2)

The consul is not to permit a British merchant ship to leave the port where he resides without his passport, which he is not to grant until the master and crew thereof have satisfied all just demands upon them; and for this purpose he ought to see the governor's pass of a garrisoned town, or the burgomaster's; unless the merchant or factor to whom the ship was consigned will make himself responsible. (3)

It is also his duty to claim and recover all wrecks, cables, and anchors belonging to British ships found at sea by fishermen or other persons, to pay the usual salvage, and to communicate a report thereof to the navy board. (4)

It has also been laid down, as a general rule that it is his special duty to establish, in a civil point of view, births, marriages, and deaths; to grant certificates of life, and to decide upon testimony cases of doubtful or disputed citizenship; and that he is appointed by the court of his country to act as commissioner in receiving evidences in important cases pending before them: and he is generally charged with the formalities of this business, and he is often requested to examine and verify affairs conducted by agents who have not satisfied the views of their constituents, and that in this respect he acts like an attorney-general, and is obliged to communicate to the party the result of his inquiry (5). However, in England it has been decided that a consul or vice-consul is not, properly speaking, a judicial officer, nor is his certificate to be admitted as evidence of the fact there stated; and that the certificate of a British vice-consul in a foreign country could not be received here as evidence of the amount of a sale,

(1) Beawes, vol. 2. p. 423. Warden. 246, 7. 1 Geo. 2. stat. 2. c. 14. s. 12. Post, Appendix, vol. 3.

(2) Abbott on Shipping. 172. Beawes, vol. 2. p. 423. Warden, 246, 7. 1 Geo. 2. stat. 2. c. 14. s. 12.

(3) Beawes, vol. 2. p. 423. Warden, 247.

(4) Beawes, vol. 2. p. 423. Warden, 247. Pardessus, 4 tom. 180, 1.

(5) Warden, 24, 5.

although by the law of that country he was constituted general agent for all absent owners of goods, and was authorized and compelled to make the sale in question, and grant his certificate. And Mansfield, Ch. J. said (1), "I thought at the trial it "was very difficult to bring this within any head of evidence: it "was somewhat analogous to the proceedings of courts and "other public functionaries; but I know no instances of such as "this being received. I dare say it would be evidence in any "other country. It came nearest to the case of judgments in "foreign courts, but we receive judgments under the seals of "court. The vice-consul is no judicial officer; he acts under a "wise regulation to prevent the improper disposition of da-"maged goods. They are put into warehouses appropriated to "them by government; the vice-consul must preside at the "auction. There is no rule in the English law which makes "his certificate evidence: he has been supposed to be an agent, "and he is to some purposes; so is an auctioneer in this country, "nevertheless his certificate is not evidence in a court of justice, "but what was done at the auction must be proved. The "business of the vice-consul is to see a fair sale; it is going "much further to say that his certificate shall bind the parties; "any body present might have proved the facts. The chiro-"graph of fines here proves itself, but the indorsement of the "proclamation of the fine must be proved by a compared copy "of the record." So it has been held that the Sound list and the Petersburgh list, which are documents transmitted by the British consuls abroad at those different places to the merchants at home, and which are publicly hung up at Batson's coffee-house for the inspection of the public, and which state the arrival of the different ships at those places, are not evidence of the facts therein stated (2). The consuls and vice-consuls of his majesty are, however, by express enactment empowered to administer oaths in all cases respecting quarantine, in like manner as if they were magistrates of the several towns or places where they respectively reside (3). It is also laid down, that a consul is to attend, if requested, all arbitrations where property is concerned between masters of British ships and the freighters, being inhabitants of the place where he resides. (4)

(1) Waldron v. Coombe, 3 Taunt. 166. Phil. Ev. 306.

(2) Roberts v. Eddington, 4 Esp. Rep. 88.

(3) 46 Geo. 3. c. 98. s. 9.

(4) Beawes, vol. 2. p. 423. Warden, 247.

It is said also to be an indispensible duty of his office, upon the complaint of their masters, to imprison disorderly seamen; but as he may thereby subject himself to an action for false imprisonment, he should be very cautious how he confines or punishes British seamen, or masters of ships, upon their mutual complaints against each other. (1)

The consul should keep a regular and well-attested account, fairly written in a book for that purpose, of all his official transactions; stating therein the date of the arrival of every British ship, the master's name, name of the ship, burthen, quality of lading, place from whence she came, to whom consigned, and her departure (2). He should strictly mark the progress of the commerce of other nations in the place of his residence; study the means of improving that of his own; and he should prepare and transmit to his government annual or periodical reports, and intelligence to the secretary of state, concerning the quality and value of articles shipped to every port; and when he observes any decline in the commerce of his own country, he should notify it, assigning the cause, and proposing suitable remedies (3). It is expected from him that he should correspond with the ambassador from his sovereign residing at the court of the prince within whose dominions his consular station lies, and send him information of any transaction which may prove detrimental to the political or commercial interests of his king or country; and in case there is no ambassador or other public minister residing in the said court, he is to transmit his intelligence directly home to the secretary of state under whose department he serves. (4).

It is his duty to support the dignity of his office, and thereby secure esteem and consideration (5). As a person invested with a public character, he has a right to demand audience of the prime minister or ministers of the sovereign or state wherein he resides, during the absence or nonresidence of ambassadors or other public ministers from his sovereign (6): he should com-

(1) Beawes, vol. 2. p. 423. Warden on Consuls, 247. Pardessus, tom. 4. 161.

(2) Beawes, vol. 2. p. 423.

(3) Beawes, vol. 2. p. 423. Warden on Consuls, 248. See Macpherson's Annals of Commerce, vol. 3. pp. 425. 432. 467. 474. 493. 560. for several such reports; and post, vol. 3.

(4) Beawes, vol. 2. p. 419.

(5) Warden, 245.

(6) Beawes, vol. 2. p. 421.

plain against all oppressive regulations, arbitrary proceedings, or imprisonment, or infraction of treaties in relation to the commerce of his country (1). And the British consul residing on the coast of Barbary has been usually charged with the execution of treaties (2); and we have seen that in those states also such consul usually has judicial power to determine disputes between British subjects and the natives of those states. (3)

Lastly, with respect to *religion*, we have seen that in most treaties there are express stipulations enabling British subjects to exercise it freely in the foreign state (4). Independently of express regulation, it is the duty of the consuls to take care to give no offence themselves, nor suffer any insult or indecency to be offered by British subjects to the established religion of the country; neither are they to make a public profession of their own, nor to hold assemblies for Protestant worship in Roman Catholic countries, unless expressly stipulated by treaty, or permitted. But, on the other hand, being always allowed the free exercise thereof personally in their own houses, they are not to be molested therein, nor are they to be prevented attending or assembling at the houses of their consuls for such purpose; and the consuls are to take care that no Protestant be forced to comply with any of the rites and ceremonies of the religion of the country: such as compelling parents to send their children to be baptized by their priests, or to be educated in the Romish faith. Neither are they to suffer the seizure of any bibles, common-prayers, or other religious books, in the houses of British subjects, though such books are strictly prohibited by the laws of the country to other inhabitants. Cases of this kind sometimes happen; and when a book has been taken out of a house by a priest or friar, it should be claimed as the property of the owner, and the offender should be proceeded against at common law, not by memorial, the common law of every country affording relief in such instances. (5)

In time of *war*, the office of a British consul is much more difficult than in time of peace; especially on account of the care he must observe to prevent any violation of the neutrality of the

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(1) Warden on Consuls, 248.
(2) Id. 249.
(3) Ante, 50. Warden, 252. Warden on Consuls, 248. 260, 1.
(4) Ante, 42.
(5) Beawes, vol. 2. p. 424.

port in which he resides, by the masters of British merchant ships; and it is his duty to inform the owners or underwriters of a ship, if required, whether the master has or has not made void the policy of insurance, by violating the freedom of navigation or the neutrality of ports. (1)

It is the duty of a British consul constantly to *reside* at the appointed place, and he cannot return home, even for a short space of time, without applying for leave of absence to the secretary of state (2). If he have obtained leave, he is to appoint a *deputy* or deputies to take care of the commercial affairs of his nation during his absence. These are no more than temporary deputies, and are generally merchants of the place. But if the consul, holding some other appointment from the crown, is absent for a considerable length of time,—or, being infirm, obtains leave to remain in his native country,—the deputy appointed to reside constantly for him may be appointed by him; but he must be presented to the secretary of state, and being *approved* by him as the sufficient deputy under the commission, he becomes an officer of the crown, takes the title of *vice-consul*, and carries on a correspondence with the public offices in every respect the same as the consul; and though his commission is signed by the consul, being a copy of his own, with the requisite alterations (3), he has no power to remove the vice-consul so appointed without the approbation of the secretary of state. If there are *subordinate deputyships* within the jurisdiction of the consulship, it is the vice-consul in this case who is to appoint persons to act in those stations, not the consul, who has given up the entire authority he held under the king's commission; as already observed, sometimes, though improperly, such deputies are natives of the country in which they are to act (4). In France there is an express regulation as to the proceedings upon

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(1) Beawes, vol. 2. p. 424.

(2) Beawes, vol. 2. p. 418, 19. Warden, 243. Pardessus, tom. 4. 142. By an imperial decree of March 16, 1813, M. Theremin, French consul at Leipsic, was deposed "for having abandoned his post without necessity, at a moment when his presence was most necessary to the army; and for not having manifested that courage and zeal which we have a right to expect from a public functionary." Warden, 209.

(3) See form of appointment of a vice-consul, post, vol. 3.

(4) Beawes, vol. 2. p. 418, 19. Warden, 243. As to the regulations in France respecting the absence of the consul, see Pardessus, tom. 4. 143.

the *death* of a consul, and which provides for the care of his official papers and a due communication of the event to the government.

The *authority and jurisdistion* of a consul only extends to persons who are the natural-born subjects of the prince from whom the consul received his commission (1). And it was held in the council of prizes in 1810, that a consul acknowledged by the French government cannot interfere in particular contests between French merchants and those of his own nation, but that decision has been ably disputed (2). And an exception is allowed in case of any foreign seamen serving on board ships of the nation which the consul represents; such seamen, of whatever nation, impliedly engaging to submit to all regulations essential for the welfare of the ship, and consequently the consul has jurisdiction over them (3). In Portugal the English consul general, or his deputy consuls or consul there, have by statutes (4) an express power of his own accord, and may also by five merchants be required, to call a meeting of the British merchants and factors, for the purpose of levying sums on trading ships for the relief of shipwrecked mariners and charitable purposes mentioned in the act; and all matters at such meetings are to be decided by the majority: and the same statutes, with a view to compel due contribution to such benevolent purposes, direct that all British or Irish captains, within ten days after their arrival at any ports in Portugal, shall deliver upon oath to the consul or deputy consul, a manifest of the cargo, and communicate the name of the consignee; and that he shall not receive his clearance outward from the consul until the duties have been paid which are destined for such charitable purposes (5). Such duties at Lisbon are received by the British consul general, according to the weight or tonnage, which is valued by two British merchants in the place, one chosen by the consul general, the other by the master of the ship, within ten days after the goods are unladen; and in case of disagreement a third person is chosen after the expiration of five days, who is obliged to decide the valuation in the course of three days (6). These statutes contain other regulations which might with propriety be extended to other countries than Portugal.

(1) 2 Beawes, 415, 16.
(2) Warden, 116, 117.
(3) Pardessus, tom. 4. 163.
(4) 8 Geo. 1. c. 17. s. 6. 9 Geo. 2. c. 25. s. 5. 10 Geo. 2. c. 14. s. 5. See the statutes, post. Appendix.
(5) See opinions on the necessity for such regulations, 2 Chalmer's Col. Op. 294—297.
(6) Id. Ibid. Warden, 245.

It is said, that by all governments a power is recognized to exist in consuls to register the births, marriages, and deaths of persons of their nation who reside in the country where they exercise their functions; and the French law in particular adopts this and other regulations conducive to that end (1). The succession or effects of Englishmen dying intestate within the consul's jurisdiction, are generally entrusted to his care (2). And in a treaty with Spain in 1667, it was expressly stipulated that the goods and estates of Englishmen dying without will in that kingdom should be put into inventory with their papers, writings, and books of account, by the consul or other public minister of the king of Great Britain, and placed in the hands of two or three merchants named by such consul or public minister, to be kept for the proprietors; and that neither the Cruzada nor any other judicatory whatever should intermeddle therein: which also in the like case was to be observed in England towards the subjects of the king of Spain (3). There was a similar clause in the treaty of commerce in 1675, between Charles the Second and the Sultan of the Turks. (4)

Of the privileges, protection, and salary of a consul

The sovereign who receives a consul into his state, thereby impliedly engages to afford him all the liberty and protection essential for his conveniently fulfilling the functions which he has consented he shall exercise: but it seems to be acknowledged in all nations, and by all writers, that it cannot be considered that a consul represents his nation like an ambassador, who is a minister sent by one sovereign to another. The mission of a consul is too limited to attribute that character to him, or to procure him that inviolability and absolute independence which public ministers enjoy (5). A consul, however, is distinguished from the merchants or inhabitants of the place where he resides by various privileges, derived from treaties or founded on usage. He is respected in a particular manner: on his arrival he is allowed a free entry for his furniture and baggage: he is exempt from the excise or inland duties on liquors and other articles of consumption for himself and family: he is entitled to a seat on the bench with the magistrates of the place, when obliged to appear at their assemblies, to act as counsel for the subjects of his nation, in all cases of dispute between them and the natives of the place:

(1) Pardessus, tom. 4. 175, 6. Ante. 61.

(2) Warden, 241. 244. Pardessus, tom. 4. 176. Ante, 61.

(3) Warden, 252.

(4) Id. 269.

(5) Pardessus, tom. 4. 148, 9.

he is exempt from lodging the military in his house: he is to be furnished with a guard, when required, to aid and assist him in the maintenance of his authority over the subjects of his own country trading to the port (1); but this power does not extend to those who are constantly resident in the place, and who, in all cases, civil or criminal, are subject to the jurisdiction of the place: he is entitled to the privilege of receiving a polite message from the magistrates, requesting his attendance, when necessary at their assemblies, instead of a formal summons or citation; and which, if he means to support the dignity of his sovereign, it is said he must never obey (2): masters of vessels are to shew him respect and obedience; and he is charged by his government with the distribution of presents (3). And there are also some trifling personal advantages, with respect to which Beawes observes, that as they do not affect the consul in his office, it is better to leave to his good sense to discover and use them with discretion, than to enumerate them as precedents, lest they should be too eagerly contended for, to the detriment of the commercial interests of his country (4). If a consul be grossly insulted or maltreated, and cannot obtain redress in the country in which he resides, the sovereign has a right to complain of such violation, and there are many instances of such an interference. (5)

But the consul is not such a public minister as in that character to be under the especial protection of the law of nations; and he is in all cases, whether civil or criminal, subject to the jurisdiction of the country in which he resides as consul (6). Vattel, indeed, says, that though the consul is no public minister, and cannot pretend to the privileges annexed to such character; yet as he bears his sovereign's commission, and in that quality is received by the prince in whose dominions he resides, he is in a certain degree entitled to the protection of the law of nations; and that the sovereign, by the very act of receiving him, tacitly engages to allow him all the liberty and safety necessary to the proper discharge of his functions, without which the admission of the consul would be nugatory and de-

(1) Beawes, vol. 2. p. 419. Warden, 249. Pardessus, tom. 4. 161, 2. 185.

(2) Beawes, vol. 2. p. 419. Warden, 249.

(3) Warden, 249.

(4) Beawes, vol. 2. p. 419.

(5) See Beawes, vol. 2. p. 420. Wicquefort, 40, 41. Observations in Viveash v. Becker, 3 M. & S. 297, 8. Vattel, b. 2. c. 2. s. 34.

(6) Beawes, vol. 2. p. 419.

lusive. And he says, that *therefore* the functions of a consul *seem* even to require that he should be independent of the ordinary *criminal* justice of the place where he resides, so as not to be molested or imprisoned, unless he himself violate the law of *nations* by some enormous crime; and that though the importance of the consular functions be not so great as to procure to the consul's person the inviolability and absolute independence enjoyed by public ministers, yet, being under the particular protection of the sovereign who employs him, and entrusted with the care of his concerns, if he commits any crime, the respect due to his master requires that he should be sent home to be punished; and that such is the mode pursued by states that are inclined to preserve a good understanding with each other: but that the surest way is expressly to settle all these matters, as far as practicable, by the commercial treaty; and that in default of treaties, custom is to be the rule on these occasions; because a prince who receives a consul without express condition, is supposed to receive him on the footing established by custom. Vattel then proceeds to argue, that the authorities quoted by Wicquefort in support of the contrary doctrine, contradict his proposition. Some other authors have followed Vattel in the same course of argument. (1)

Wicquefort, in his treatise of the office of ambassador (2), states, that "princes who employ consuls protect them, as persons concerned in their service, and as every good master protects his servants and domestics, but not as public ministers. The governor of Cadiz having within seven or eight months affronted and confined the Dutch consul, the estates of the United Provinces complained thereof to the court of Madrid, as a violence done to the law of nations; instead of complaining of the violation of those treaties wherein they ought to find safety and security for their pretended minister, and not elsewhere. Some years since they were for making the consul (who resided at Genoa) pass for a public minister, but the senate wrote them word that they did not acknowledge him for a public minister, and that all that could be expected from them, was the peaceable fruition of those rights and privileges which custom has

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(1) Vattel, b. 2. c. 2. s. 34. Warden, 90, 91—95. 100. 104. See also Le Ministre public dans les Cours Estrangeres, &c. par du Franquenay, Amsterdam, 1733. chap. 11. Borel de l'Origne et des Fonctions des Consuls, pp. 39, 40. See observations on that part of Vattel's Argument in 3 M. & S. 297, 8.

(2) B. 1. c. 5. p. 40.

bestowed on this kind of employment. Consuls are only merchants who, notwithstanding their office of judge in the controversies that may arise among those of their own nation, carry on at the same time their own traffic, and are liable to the justice of the place where they reside, as well in civil as criminal matters, which is altogether inconsistent with the quality of a public minister." This doctrine has not only been recognized by Beawes in his Lex Mercatoria (1), but has lately been confirmed and established by the court of king's bench in the case of Viveash v. Becker (2); in which it was decided that a resident merchant of London, who is appointed and acts in England as consul to a foreign prince, is not exempted from arrest upon mesne process in a civil action. And the court held clearly that he was not a public minister within the meaning of the statute 7 Anne, c. 12, which privileges ambassadors and other ministers from arrest; and that as to the observation that a consul is entitled to the protection of the law of nations, so is every man who comes into this country from a foreign state under a safe-conduct: that this particular consul was also a natural-born subject of this country, and carrying on commerce as a merchant here, which constituted additional reasons against his claim of privilege. That as a consul has the power of appointing a deputy or vice-consul, no inconvenience can result from his being liable to arrest; and on the contrary, if he were privileged, so would be every vice-consul he might appoint in every port, which increase of immunities would be the means of creating an exemption from arrest indirectly, which the crown could not grant directly, and the number of which would be enormous. Other of our law authorities state it is an incontrovertible doctrine, that a consul has not the privilege of ambassadors or other public ministers. The Lord Chancellor Talbot, in Barbuit's case (3), expressed that opinion; and also considered, that a party having a commission as *agent of commerce* from the king of Prussia, not intrusting him to transact affairs between the two crowns, but only to assist his Prussian majesty's subjects here in their commerce, did not privilege him from arrest. Again, in Clark v. Critico (4), which was decided on the ground

(1) Vol. 2. p. 419. See also Pardessus, tom. 4. p. 149. Brown in his Elements of Civil Law, 91. Boucher's Ed. Consulat. de la Mer.

(2) 3 M. & S. 285.

(3) Rep. Temp. Talbot, 281. See observations of Lord Ellenborough on this case, in Viveash v. Becker, 3 M. & S. 296, 7.; and see Com. Dig. Ambassador, B.

(4) 1 Taunt. 106. See also Marshal v. Critico, 9 East. 447.

of the party having been divested of the character of consul at the time of his arrest, Mansfield, C. J. seems to have inclined to the opinion that a consul is not privileged. It seems, therefore, to be now established in this country, that a consul is subject to the civil and criminal law of the country in which he officiates. But there are two decisions, one by the imperial court of cassation, and the other by the imperial prize court at Paris, that foreign consuls cannot be prosecuted before a French tribunal for acts done by them in France by order of their government, and with the authorisation of the French government; and that in general a consul cannot be prosecuted without the previous consent of his government (1). In a late work on the French commercial law (2) it is stated, that the privileges of consuls, as well with respect to actions which private men can bring against them, as in cases where they should be prevented from disturbing public order or committing every other crime, depend upon the treaties entered into by the respective states, or usage which has not been derogated by particular treaties. They are much less extensive in Christian than Mahometan countries. In the latter, consuls are free from all taxes, and cannot be imprisoned for any cause whatever, except by demanding justice against them of the Porte. But if it be a Frenchman who has a demand against the consul or vice-consul of his nation, in a foreign country, he can only sue him before the tribunal in France. The tribunals of the place, however, would not be incompetent, as they are with respect to ambassadors; they should only allow exceptions to be taken to their jurisdiction when treaties forbid them the cognizance of the action, the same as with regard to the treaties of France with the Ottoman empire. By the present French consular system, it seems that if a consul contract debts or commercial engagements towards the inhabitants of the place of his residence, he is responsible to the tribunals of that place. (3)

The *salary* of a consul ought to be commensurate with his situation, and enable him to subsist without having on his own account any commercial duties (4). In some places English consuls have salaries from the crown; in others they have nothing but the pecuniary dues or fees of office. Where English

Of the consul's fees.

(1) See the cases stated, Warden, 108—116.
(2) Pardessus, tom. 4. 149.
(3) Warden, 200.
(4) Id. 21.

factors are established, the fees are regulated by the burthen of the ship; in others, by the length of the voyage. It has been observed, that it is remarkable that the consuls of other nations are protected by the sovereigns, and authorized to take the consul's fees; but the British have not any authority whatever to support their claims where there is no commercial treaty. If a master refuse to pay them, the consul cannot detain the ship, for the owners and freighters would bring their actions for damages; but it is stated that Lord Chancellor Hardwicke held that the consul might send on board and seize any piece of valuable furniture belonging to the cabin, which would not hinder the navigation of the ship, and detain it for his fee (1). In a late publication (2) the numerous advantages of consular establishments are urged as sufficient motives for their multiplication and support; and that the duties of customs alone upon a very few cargoes of merchandize would more than pay the salaries of all our consuls in the Mediterranean; and had England three times the number there, it would always be of increased advantage to this country: that when a man of war goes into any port of the Mediterranean for supplies, the vice-consul, usually a Greek or Italian, will not furnish them unless he has a prospect of gaining thirty-five *per cent.* exclusive of the usual commission; no British accredited consul would suffer this within his jurisdiction. In France the subject of consuls has always been a principal object, both in the time of the monarchy and of the republic: the late conduct of the French, in sending an immense number of consuls and commercial agents to all ports and cities of any consequence in the Morea, Levant, and Egypt, ought to have been sufficient to open the eyes of the English." Great Britain certainly appears to have paid less attention to the office of consul, and the regulations respecting it, than some other of the states of Europe.

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(1) Beawes, vol. 2. p. 423. Warden, 260.

(2) Reflections on the Commerce of the Mediterranean, &c. by John Jackson, Esq. F. S. A. New York edition.

CHAP. IV.

Of the Freedom of Trade.—The Illegality of Restrictions on the Commerce of independent States.—The Right of a Nation to limit its own Commerce, and Consequences of Infraction.—The Right to refuse free Passage by Land or Water, or limit the same; and of the Dominion of the Seas.—Of the British Seas.—Consequent Rights.—Modifications of the general Law of Nations by particular Treaties.

HAVING in the last chapter considered the facilities to commerce by the employment of consuls, we are now to proceed further to inquire how far the commerce of a country may be legally affected in the time of peace by the acts of foreign states, and especially of the *freedom of trade*—the illegality of interfering with the commerce of independent states—the right of a nation to prohibit or impose regulations on the commerce or intercourse of another nation with her own state or her colonies, and to refuse passage through her territories, whether by land or water, and the consequent rights and liabilities. The discussion of these rights involve some of the greatest questions of international law, and in a mercantile point of view, as connected with the right of imposing limitations upon commerce, are matters of most important concern. The restrictions on trade which have been enforced absolutely or conditionally by almost all the powerful nations of the world, have been the cause of a thousand wars, and the groundwork of innumerable treaties; and therefore it is important that we should give them full consideration.

With respect to the *freedom of trade* it has been laid down by the wisest of politicians and best of men, that every nation ought not only to countenance trade as far as it reasonably can, but even to protect and favour it; and that *freedom* being very favourable to commerce, it is implied in the duties of nations, that they should support it as far as possible, instead of cramping it by unnecessary burdens or restrictions; and this position is supported by the following reasons: "all men ought to find

on earth the things they stand in need of. In the primitive state of communion, they took them wherever they happened to meet with them, if another had not before appropriated them to his own use. The introduction of dominion and property could not deprive men of so essential a right, and consequently it cannot take place without leaving them, in general, some mean of procuring what is useful or necessary to them. The mean is commerce: by it every man may still supply his wants. Things being now become property, there is no obtaining them without the owner's consent; nor are they usually to be had for nothing; but they may be bought or exchanged for other things of equal value. Men are therefore under an obligation to carry on that commerce with each other, if they wish not to deviate from the views of nature; and this obligation extends also to whole nations or states. It is seldom that nature is seen in one place to produce every thing necessary for the use of man; one country abounds in corn, another in pastures and cattle, a third in timber and metals, &c. If all those countries trade together, as is agreeable to human nature, no one of them will be without such things as are useful and necessary; and the views of nature, our common mother, will be fulfilled. Further, one country is fitter for some kind of products than another; as, for instance, fitter for the vine than for tillage, If trade and barter take place, every nation, on the certainty of procuring what it wants, will employ its land and its industry in the most advantageous manner; and mankind in general prove gainers by it. Such are the foundations of the general obligation incumbent on nations reciprocally to cultivate commerce (1)." It was this feeling that influenced that celebrated statesman Mr. Pitt in concluding the commercial treaty with France in 1786. Great Britain and France had for centuries before, contrary to every sound principle of policy, been rival enemies (2); and their commercial policy was dictated by the same spirit which prompted their unhappy wars; insomuch that though they possessed the materials of a most extensive commerce, the one abounding in all that art and industry can supply, and the other in the productions of a more favoured soil and climate, the exchange of their peculiar produce was discouraged by a complicated system of restraints and heavy duties (3). The

(1) Vattel, b. 2. c. 2. s. 21. 252, 3. Tucker's Pamphlet, Cui Bono.
(2) 2 Smith's W. of N. 226, 7.
(3) Id. ibid.

object of the commercial treaty alluded to was to abolish those pernicious restraints, and by connecting the two countries in the bonds of a reciprocal trade, to pledge them by their mutual interest to an oblivion of their ancient animosities. The view in which this treaty originated was explained by Mr. Pitt when it was submitted to parliament; and the sentiments which he expressed gave to this measure a remarkable character of moderation and of wisdom. In reply to an argument inculcating constant jealousy of France (1), he inquired whether, in using the word *jealousy* it was meant to recommend to this country such a species of jealousy as should be either mad or blind; such a species of jealousy as should induce her either madly to throw away what was to make her happy, or blindly grasp at that which must end in her ruin. Was the necessity of a perpetual animosity with France so evident and so pressing, that for it we were to sacrifice every commercial advantage we might expect from a friendly intercourse with that country; or was a pacific connection between the two kingdoms so highly offensive, that even an extension of commerce could not counterpoise it? Towards the close of the same speech he observes: the quarrels between France and Britain had too long continued to harass not only those two great nations themselves, but had frequently embroiled the peace of Europe; nay, it had disturbed the tranquillity of the most remote parts of the world. They had by their past conduct acted as if they were intended for the destruction of each other; but he hoped the time was now come, when they should justify the order of the universe, and shew that they were better calculated for the more amiable purposes of friendly intercourse and mutual benevolence. "Considering the treaty," he continued, "in a political view, he should not hesitate to contend against the too frequently advanced doctrine, that France was and must be the unalterable enemy of Britain: his mind revolted from this position, as monstrous and impossible. To suppose that any nation was unalterably the enemy of another was weak and childish. It had neither its foundation in the experience of nations nor in the history of man. It was a libel on the constitution of political societies, and supposed diabolical malice in the original frame of man."

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(1) See Smith's W. of N. vol. 4. p. 169. per Buchanan; and see Anderson's Hist. Com. vol. 4. pp. 634 to 639.

The general principle then being, that it is the interest and duty of nations to encourage commercial intercourse with each other, we will now consider —*first*, how far one nation can legally interfere with or impose regulations on the commerce which other independent states may think fit to carry on with each other; and, *secondly*, how far one nation may legally refuse to permit another to have *commercial* transactions with her subjects; and, *thirdly*, how far she may refuse free passage over her lands or waters.

Illegality of interference with commerce between other independent states.

It is a general rule of the law of nations, that in time of peace nations are *not* entitled to *limit or impose regulations* on the commerce which any independent state may think fit to carry on, either externally with the natives of other independent states, or internally among its own subjects. The right which, in general, every state possesses, of buying and selling with all other states who choose to deal with her, is established by the natural and acknowledged by the positive law of nations. "Every state," says Vattel in his law of nations, "in virtue of her natural liberty, has a right to trade with those who are willing to correspond with such intentions; and to molest her in the exercise of her right, is doing her an injury, and violating the law of nations. The Portuguese, at the time of their great power in the East Indies, were for excluding all other European nations from any commerce with the Indians; but such a pretension, no less iniquitous than chimerical, was treated with contempt, and the other nations agreed to consider any acts of violence in support of it, as just grounds for making war against the Portuguese (1)." This common right of all nations is at present generally acknowledged, under the appellation of *freedom of trade*.

This position, however, is not to be understood as authorizing a trade with the *colonies* of other states; for when a territory is so completely held in possession by a superior state, as to be absolutely colonized, the superior state incurs the same expences of defence, and acquires the same corresponding rights, as those

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(1) Vattel, b. 2. c. 2. s. 24. p. 144. Puffend. b. 4. c. 5. s. 10. p. 168. Marten's L. N. 152, 3; where see, in page 153*, the different authorities in support of this position. It there seems that an exclusive trade may be acquired by a treaty with the nations of India, who have not before entered into a restrictive treaty.

arising from its domestic possessions (1). Portugal, therefore, though she had no right to interfere for the prevention of any trade which other nations thought fit to carry on with independent states in India, had ample right to prevent the merchantmen of Europe from trading to Portuguese Brazil, which is the actually appropriated and colonized territory of the Portuguese people. Of this right, inherent in all states, to impose limitations upon their own commerce, and (which is the same thing) upon the commerce of their colonies, we shall hereafter have occasion to speak more in detail; as well as of the rights which in time of war every state has of limiting, in some respects, the commerce of neutrals.

Upon the same principle the decisions of British courts have uniformly proceeded; still refusing to give effect to any arbitrary regulation of any foreign country, even in the *remotest* degree restrictive of the freedom which belongs to commerce. Thus, in the case of *Pollard* and *Bell* (2), it was held that a warranty of neutrality in a policy of insurance, is not falsified by a sentence of a foreign court of admiralty condemning a ship for navigating contrary to the ordinances of that belligerent state, to which the neutral country had not assented. The sentence of condemnation recited a French ordinance, which declared, that all ships should be confiscated "wherever there shall be found on board a supercargo, merchant, commissary, or chief officer, being an enemy;" and the condemnation was because the captain was a Scotchman, which was not, by the law of nations, any sufficient ground of condemnation. And Lord Kenyon, with reference to the power of a state over the commerce of her neighbours, gave this opinion: "It was said by the defendant's counsel, that an arrêt has the same force as a treaty: but, without stopping to enlarge on the difference between them, it is sufficient to say, that the one is a contract made by the contracting parties, and that the other is an ex-parte ordinance, made by *one* nation only, to which no other state is a party: and I concur with Lord Mansfield in opinion, that it is not competent to *one* nation to add to the law of nations by its own arbitrary ordinances, without the concurrence of other nations. That is the ground on which this case must be decided." And Mr. Justice Law-

(1) 3 Smith, 64; and case of Immanuel, 2 Rob. R. 198. Marten's L. N. 151. Post, neutral trade.

(2) 8 T. R. 437.

rence, in the same case, cited and adopted an opinion, which Mr. J. Ashurst, in the case of *Saloucci* and *Johnson*, had delivered to the same effect; that "though the ship," which constituted the subject of that case, "acted contrary to a *particular* ordinance of *Spain*, other nations are not bound to take notice of such ordinance, unless in virtue of some treaty subsisting between two states, by which they submit to be bound by such ordinance." So, in the case of *Bird* and *Appleton* (1), where the question partly turned upon the legality of a ship's condemnation by a foreign prize court, for want of certain documents, Lord Kenyon finding that such documents appeared to be required neither by the law of nations nor by treaty, but merely by the caprice of the country making the seizure, expressed himself to the following purport in giving judgment: "The foreign court thought that they had a right to impose something on an independent nation beyond what is required by the law of nations, or by the treaty entered into by that independent nation; but that certainly is not obligatory on such nation."

But in cases which do not involve the same injustice, and in which, therefore, the reason of the rule ceases, there exist exceptions, which are principally of *two classes.*—First, the cases arising out of commercial treaties, by which any nation may acquire the right of limiting the commerce of any other state or states, according to the extent of the powers which such treaty may bestow (2). Thus many nations out of Europe, particularly several Indian kings or chiefs, have made treaties with certain European powers, in virtue of which those powers enjoy an exclusive trade with them; and those kings are bound not to make any alterations towards favoring or opening a commerce with other powers (3). So there are examples of powers of Europe promising not to carry on commerce, or not to extend their commerce to the East Indies (4).—Secondly, the cases where the concession of particular indulgences by any state, for the facilitation of commercial intercourse between other states, being simply matter of favor, may be considered as entitling the state by whom the indulgence is conceded, to annex any reasonable

(1) 8 T. R. 568; and see observations in Lothian v. Henderson, 3 Bos. & Pul. 532.

(2) Puff. b. 4. s. 10. p. 168. See instances, Marten's L. N. 152. Ante, 39—42.

(3) Marten's L. N. 152. Ante, 40, 41. n. 1.

(4) Marten's L. N. 152. Ante, 40, 41.

conditions to her grant. These will be considered under the next head.

Of the right of a nation to decline commercial intercourse with another state, and consequent rights.

Secondly, we are to consider how far a nation may legally limit her own commercial transactions with another state. Generally speaking, the commerce in Europe is so far free, that no nation refuses positively and entirely to permit the subjects of another nation, in time of peace, even when there is no treaty between them, to trade with the mother state, or to establish themselves in its territory for that purpose. But nevertheless, as long as there is no treaty existing, the broad principle seems to be, that every nation has a right to limit, and even totally prohibit, her own commerce and that of her colonies with foreign states, either absolutely or conditionally. She is therefore fully authorized, *first*, to prohibit the import or export of certain merchandizes; *secondly*, to institute customs and to augment them at pleasure; *thirdly*, to prescribe the manner in which the commerce with its dominions shall be carried on; *fourthly*, to point out the places where it shall be carried on, or to exempt from it certain parts of its dominions; *fifthly*, to exercise freely its sovereign power over the foreigners living in its territories; *sixthly*, to make whatever distinctions between the nations with whom it trades it may find conducive to its interests (1). With respect to the commerce out of Europe, all the powers which have formed settlements abroad have so appropriated the trade of those possessions to themselves, either in permitting all their own subjects exclusively to partake of it, or in granting a monopoly to trading companies, that the colonists can carry on hardly any trade with other powers; consequently the commerce in those possessions is not free to foreign nations; they are not even permitted to land in the country, or to enter with their vessels within cannon-shot of the shore, except only in cases of urgent necessity (2). This right of a nation to exclude from her colonies a foreign nation, being a part of the same right as that which enables the mother state to decline commercial transactions with another state, is received and acknowledged by all nations. We will consider the authorities and principles upon this subject. "Every nation," says Vattel (3), "has a right to prohibit the entrance of foreign merchandize; and the nations that are affected by such prohibition have no right to complain of it, as if they had been refused an office of huma-

(1) Marten's L. of N. 150, 1.
(2) Id. 151, 2.
(3) B. 1. c. 8. s. 90.

nity." And again, he observes, "Since a nation cannot have a natural right to sell her merchandizes to another that is unwilling to purchase them; since she has only an imperfect right to buy what she wants of others; since it belongs only to these last to judge whether it be proper for them to sell or not; and finally, since commerce consists in mutually buying and selling all sorts of commodities; it is evident that it depends on the will of any nation to carry on commerce with another, or let it alone." "Thus," continues the same author (1), "although two nations have traded together without interruption during a century, this long usage does not give any right to either of them; nor is the one obliged on this account to suffer the other to come in and sell its merchandizes, or to buy others: they both preserve the double right of prohibiting the entrance of foreign merchandize, and of selling their own wherever people are willing to buy them. Although the English have from time immemorial been accustomed to get wine from Portugal, they are not on that account obliged to continue the trade, and have not lost the liberty of purchasing their wines elsewhere. Although they have in the same manner been long accustomed to sell their cloth in that kingdom, they have, nevertheless, a right to transfer that trade to any other country. And the Portuguese, on their part, are not obliged by this long custom either to sell their wines to the English, or to purchase their cloths. If a nation desires any right of commerce which shall no longer depend on the will of another, she must acquire it by treaty." Again, he contends thus in a subsequent passage: (2) "We have already seen that each nation is, on her own part, the sole judge, whether or not it be convenient for her to cultivate this or that branch of commerce: she may therefore either embrace or reject any commercial proposals from foreign nations, without affording them any just grounds to accuse her of injustice, or to demand a reason for such refusal, much less to make use of compulsion. She is free in the administration of her affairs, without being accountable to any other. The obligation to trade with other nations is in itself an imperfect obligation, and gives them only an imperfect right; so that in cases where the commerce would be detrimental, that obligation is entirely void." So *Grotius* says (3): "I remember I have heard it questioned, whether one nation may contract with another to purchase all the commodities of a particular kind which are the produce of that country only: and I think it may

(1) Vattel, b. 1. c. 8. s. 95. p. 41.

(2) Id. b. 2. c. 2. s. 25. p. 141.

(3) Grotius, 158.

be lawful, provided the buyers shall be ready to dispose of them to others at a reasonable rate; for it signifies nothing to other people from whom they are supplied with what nature has occasion for. But, in matter of mere profit, one may lawfully prevent another, especially if there be any particular reason for it; as when a nation has taken under their protection the people with whom they make such a contract, and are therefore obliged to be at an extraordinary expence. This sort of monopoly, practised in the manner and with the intention I observed, is no ways repugnant to the law of nature; though the civil laws, out of regard to the public advantage, do sometimes prohibit it." Puffendorf also says (1): "A prince may justly ordain that no goods of the growth or manufacture of his dominions shall be exported by foreigners, unless by such as have obtained this privilege, either upon covenant, or by free grant: so if a people of Europe, for instance, have appropriated any country in Africa or the Indies, by such means and in such manner as the custom of nations makes effectual towards the acquiring dominion, they may with like justice, if they think fit, cut off from others all passage thither on account of traffic, or not allow it but under certain conditions, or some settled burthens and duties. And this we now see in every day's practice: nor doth it appear to be in any respect repugnant to natural reason. For that liberty of commerce, on which some ground such high pretensions, doth not preclude a state from allowing more favour to its *own* subjects than to strangers."

Forfeiture and loss of right of action, if a foreigner be concerned in a prohibited trade.

From this undoubted right of every nation to limit or even prohibit her own commerce, it seems to follow as a necessary consequence, that she is entitled to seize as forfeited the goods of those strangers who trade to her territories in violation and contempt of her regulations for their exclusion, and to refuse the enforcement of their contracts (2). Sometimes the government extends its limitations only to certain branches of traffic. In this case also, as well as in that of a complete prohibition, it is no less competent to that government to subject the goods of foreigners to forfeiture, and to seize those of its own subjects: for if foreigners will trade with their eyes open in despite of a known prohibition, whatever ill effects may follow they must needs be considered to have brought upon themselves. Thus, in Waymell v. Reed, and an-

(1) Puffendorf, b. 4. c. 5. s. 10. p. 168.

(2) Bird and Appleton, 8 Term Rep. 562.

other (1); an action to recover the price of goods sold, where it appeared in evidence that the defendants had applied to the plaintiff, who was a foreigner living at Lisle, for a quantity of lace, which he knew was intended to be smuggled into England, and for that purpose it was packed by the plaintiff in a peculiar manner, by the direction of the defendant, for the more easy conveyance of it without discovery; it was decided that the plaintiff could not recover; and Lord Kenyon observed, "it is not necessary to inquire now, whether or not it be immoral for a native of one country to enter into a contract with the subject of another to assist the latter in defrauding the revenue laws of his country. It is sufficient, in order to dispose of this case, to advert to the distinction laid down by Lord Mansfield in Holman v. Johnson (2), to which I entirely subscribe, that where the contract and delivery of goods are complete *abroad*, and the seller does no act to assist the smuggling them into this country, such a contract is valid, and may be recovered upon here. But here the plaintiff was concerned in giving assistance to the defendants to smuggle the goods, by packing them in the manner most suitable for and with intent to aid that purpose. He cannot therefore resort to the laws of this country to assist him in carrying his contract into execution."

But though it is admitted that each country has a right to enforce her own revenue laws, not only against her own subjects but also against foreigners who are knowingly guilty of an infraction of such laws, yet it seems to have been considered in England as an established rule, *that one country will not take notice of the revenue laws of another*, though in a state of amity with her. Thus, in the case of Boucher and Lawson (3), we find Lord Hardwicke deciding, "that the unlawfulness by the Portuguese laws of exporting gold from Portugal makes no difference in an action *here*, for it is not material to us what the law of *Portugal* is, but what the law of England is: and *here* in *England* it is not only a lawful trade, but very much encouraged." Of the same tenor is the 3d section of the stat. 19 Geo. II. ch. 37. which enables persons who carry on a traffic with the Spanish and Portuguese colonies, to insure in the same manner as before; that act seems to have been made with a direct view of favouring people in smuggling bullion

(1) 5 T. R. 599. 1 Esp. Rep. 91. 3 T. R. 454. 4 T. R. 466. Cowp. 341.

(2) Cowp. 344.

(3) Rep. Temp. Hardw. 198.

from those colonies, who, as Emerigon remarks, could obtain no bills of lading or other evidence of their cargoes (1). This doctrine has been carried so far, that in the case of Planche v. Fletcher (2), an insurance upon a voyage in which it was intended to defraud the revenue of a foreign state, was holden not to be illegal, though fictitious papers were fabricated for the purpose of facilitating the fraud; and Lord Mansfield said, "as we have laid a large duty on French goods, the French may have done the same on ours, and it may be the interest of the farmers to connive at the importation of English commodities, and take Ostend duties, rather than stop the trade, by exacting a tax which amounts to a prohibition: but at any rate this was no fraud in this country: one nation does not take notice of th revenue laws of another." And in the subsequent case of Lever and Fletcher at Nisi Prius (3), Lord Mansfield decided, "that even where the trade insured was carried on by British subjects, not only contrary to the laws of a foreign state, but contrary also to the express provisions of a treaty to which Great Britain was a party, yet as the insurer subscribed the policy, with full knowledge of the nature of the contract, it was binding upon him:" and Lord Mansfield said, "though such trading be contrary to the laws of Spain, yet no country pays attention to the revenue laws of another. Therefore if the defendant had, with full knowledge that it was a smuggling trade with Spain, made the insurance, then it might be a fair contract between the parties."

There is something in these decisions to which a liberal mind cannot readily assent, and the impropriety of them seems to have been hinted at by Lord Kenyon in the before-mentioned case of Weymell *v.* Reed (4). It is impossible not to feel a greater inclination toward the opinion of Pothier, who observes, "that a man cannot carry on a contraband trade in a foreign country without engaging the subjects of that country to commit an offence against the laws, which it is their duty to obey; and it is a crime of moral turpitude to engage a man to commit a crime: that a man carrying on commerce in any country, is bound to conform to the laws of that country; and therefore to carry on an illicit commerce there, and to engage the subjects of

(1) 1 Marsh. on Insurance, 53. Emerigon, vol. 1. p. 212.

(2) Doug. 252.

(3) A. D. 1780. Park on Ins. 237. 1 Marsh. 54.

(4) Ante, p. 81.

that country to assist him in so doing, is against good faith; and consequently a contract made to favor or protect this commerce is peculiarly unlawful, and can raise no obligation." (1)

If our law be justifiable in protecting these transgressions, it can be only on the plea of necessity; but where is the necessity? Shall we be told, that it is impossible to ascertain in the English courts the complex provisions of another country's revenue law? Surely this argument can avail but little, when it is recollected, that in all cases where the argument is not convenient, the law of another country, however complex, is the rule by which contracts negotiated in that country are tried and construed. It may be true that the rule of our law was adopted by way of retaliation for the illiberal conduct of other states, and is continued from a cautious policy; but a cautious policy in a great state is but too often a narrow policy; and after all, the best policy for a state, as well as for an individual, will perhaps be found to consist in honesty and honourable conduct. Indeed the system is so directly opposite to the clear principles of right feeling between man and man, that nothing could have withheld the states of Europe from concurring for its total abrogation, except the smallness of the gain or loss that attends upon it. (2)

This doctrine and these decisions, however, merely prove that one country will not enforce the revenue laws of another: they by no means invalidate the general position, that each country has a lawful power to enforce her own; a power which she enjoys alike against her own subjects and against foreigners, by virtue of her acknowledged right to limit her own commerce, either by prohibiting the intercourse of strangers entirely, or by permitting it upon her own conditions.

Of the right to refuse or impose limitations on the passage through the land, rivers, or seas of a state.

Thirdly, We are now to consider how far a state may refuse *free passage* through her lands, rivers, and seas, for the accommodation of two or more other states; and what conditions, if any, she may lawfully annex to the indulgence, which it may rest with herself to allow or to withhold. The opinions of the most eminent jurists on these points are extremely various, and the celebrated Grotius sometimes appears inconsistent, not only

(1) Pothier, n. 58. Emerigon, vol. 1. p. 212. 215.

(2) See Marshal on Insurance, vol. 1. pp. 52, 3. 1st edit.; and ante 27, as to the conduct one state should observe towards another.

with other writers, but even with himself. *Vattel* (1) lays down the law with greater clearness and certainty: "The introduction of property," says he, "cannot be supposed to have deprived nations of the general right of traversing the earth, for the purposes of mutual intercourse, of carrying on commerce with each other, and for other just reasons. It is only on particular occasions, when the owner of a country thinks it would be prejudicial or dangerous to allow a passage through it, that he ought to refuse permission to pass. He is therefore bound to grant a passage for lawful purposes whenever he can do it *without inconvenience* to himself. And he cannot lawfully annex *burthensome* conditions to a permission which he is obliged to grant, and which he cannot refuse if he wishes to discharge his duty and not abuse his right of property." "In like manner," continues Vattel (2), "a passage ought also to be granted for merchandize; and as this is in general productive of no inconvenience, to refuse it without just reason is injuring a nation, and endeavouring to deprive her of the means of carrying on a trade with other states." From these and other declarations it should appear, that to refuse passage for merchandize over land or navigable streams, is culpable only when the passage would be attended with no inconvenience to the country granting it; but of that inconvenience each state must judge for itself. Thus Vattel, in another passage (3) declares, "the sovereign may forbid the entrance of his territory, either to foreigners in general or in particular cases, or to certain persons, or for certain particular purposes, according as he may think it advantageous to the state. There is nothing in all this that does not flow from the rights of the domain and sovereignty: every one is obliged to pay respect to the prohibition; and whoever dares to violate it, incurs the penalty decreed to render it effectual. But the prohibition ought to be known, as well as the penalty annexed to disobedience: those who are ignorant of it ought to be informed of it when they approach to enter the country. Formerly the Chinese, fearing lest the intercourse of strangers would corrupt the manners of the nation, and impair the maxims of a wise but singular government, forbade all people entering the empire: a prohibition that was not at all inconsistent with justice, provided they did not refuse humane

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(1) Vattel, b. 2. c. 10. s. 132. pp. 184, 5. p. 183.

(2) Vattel. b. 2. c. 10. s. 134. p. 170.

(3) Vattel, b. 2. c. 7. s. 94.

assistance to those whom tempest or necessity obliged to approach their frontiers. It was salutary to the nation, without violating the rights of any individual, or even the duties of humanity, which permit us, in case of competition, to prefer ourselves to others." (1)

Proceeding upon the principle stated in the last part of this paragraph, that the duties of humanity permit us, in case of competition, to prefer ourselves to others, we shall not be carrying our conclusions too far if we assume that, whenever our interests are likely to be injured by the grant of an indulgence to foreigners, we are perfectly entitled to withhold such indulgence; whether the inconvenience we apprehend be calculated to affect our morals, our laws, our safety, our commerce, or any other of those advantages which we are impelled by nature to secure and improve for ourselves (2). The arguments, therefore, of those who claim the freedom of passage for merchandize as a natural and indefeasible right, are, in common reason and justice, resolvable into this simple position,—that a nation ought not to refuse to her friendly neighbours those advantages which she can afford to allow them without loss or inconvenience to herself; a position exceedingly clear, and one which few states will find any temptation to dispute. Beyond this point, it may confidently be asserted, that the permission of passage to the subjects and merchandize of other states, unless provided for by treaties, is no duty whatever, except perhaps in a few extreme cases, where the refusal would be contrary to the dictates of humanity; and even in these cases the duty will not be obligatory upon us, if the disadvantage which the permission imposes upon ourselves is likely to be greater than the advantage resulting to the cause of humanity. "There are," says Vattel (3), "states, such as China and Japan, into which all foreigners are forbid to penetrate without an express permission; but in Europe the access is everywhere free to every person who is not an enemy to the state; except in some countries to vagabonds and outcasts." However, in another part of the same page he says, (what indeed, from the previous propositions, arises as a natural corollary), "that since the lord of the terri-

(1) See also Marten's L. of N. 153.

(2) See observations, post, as to the admission of aliens into a foreign country.

(3) Vattel, b. 2. c. 8. s. 100. p. 172. Marten's L. of N. 153.

tory may, whenever he thinks proper, forbid its being entered, he has, no doubt, a power to annex what conditions he pleases to the permission to enter. This, as we have already said, is a consequence of the right of domain." (1)

Grotius, in his statements on this subject, is by no means equally satisfactory. He seems to conceive that the freedom of passage for men and merchandize through the territories of a state, is not a matter which that state may grant or refuse, according to its own judgment of the policy or impolicy of either step; but a matter which one state is bound to grant, and which another may enforce, even at the point of the sword. He goes so far as to say (2), " It cannot be reasonably objected, that there may be suspicion of danger from the passing of a multitude; for one man's right is not diminished by another man's fear." And yet the reason which he gives for the existence of any right of passage at all is, that it benefits one party without injury to the other — the very principle which we have endeavoured to enforce. " The liberty of passing," says he, " is due not to persons only, but to goods and merchandize; for nobody has a right to hinder one nation from trading with another distant nation; it being for the interest of society in general, and no way detrimental to any person." But he takes an extraordinary view of the detriment that one nation may suffer by the acts of another, when he asserts, that " if any one be disappointed of a profit which he only expected, but had no title to, this ought not to be reputed any injury." From this he would infer, that a stranger does me no detriment by coming through my lands, and forestalling me in that trade, which, if he had never entered my ground, I should have reaped for myself. If this be no detriment, then the broad rule that Grotius would establish is perfectly defensible; and it may then be received as the law of nature and nations, that no apprehension of danger to the persons, or diminution to the commerce, of a state, can justify her in prohibiting the passage of strangers or merchandize through her territories. But if, on the other hand, the usurpation by strangers of profits which nature had enabled a state to secure for itself, be a detriment to that state, then she has a right to prevent such usurpations, by cutting off that freedom of passage by favour of which they are committed: for, in

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(1) Vattel, b. 2. c. 8. s. 100. p. 172. (2) Grotius, b. 2. c. 2. p. 153.

truth, as to any right existing in one set of men to pass and repass upon the territories of another, we cannot discover any argument for it; except that it is the duty of all men to do kindnesses to their neighbours, whenever they can do so without an overbalance of disadvantage to themselves: as soon as this overbalance of disadvantage begins, in that moment ceases all right to the accommodation required; and the overbalance is a matter for the calculation solely of the state herself by whom the favour is granted, and who must be the only competent judge of her own circumstances.

On this description of duties, Vattel (1) thus conclusively reasons: "The duties that we owe to ourselves being unquestionably paramount to those we owe to others, a nation owes to herself, in the first instance, and in preference to all other nations, to do every thing she can to promote her own happiness and perfection. I say every thing she can, not only in a physical but in a moral sense; that is, every thing that she can do lawfully and consistently with justice and honor. When, therefore, she cannot contribute to the welfare of another nation without doing an essential injury to herself, her obligation on that particular occasion ceases, and she is considered as lying under a disability to perform the office in question." Puffendorf (2) also writes clearly and decidedly on this important subject; he observes, "The law of humanity does not seem to oblige us to grant passage to any other goods, except such as are absolutely necessary for the support of their life to whom they are thus conveyed."

Of the dominion of the main seas, and right to limit the passage thereon.

Having thus considered the obligation upon a state to allow a passage through her own *territories*, whether *land* or *navigable streams*, we will proceed to examine how far a particular people may be entitled to limit the passage of strangers over the *main seas*; or, in other words, how far any particular state may lawfully appropriate to herself the dominion of the ocean. To Englishmen, in particular, this question must be in the highest degree interesting; because, at this time, the United Kingdom is the only state qualified, by her maritime greatness, to assume the dominion of the seas. And, indeed, if it be reasonable that any one state should possess an exclusive dominion over any part

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(1) Vattel's Prelim. s. 14. p. 61. (2) Puffendorf, b. 3. c. 3. s. 6. p. 29.

of the open sea, none seems more amply entitled to such a dominion than Great Britain, not only from her power to keep undisturbed possession of the seas she may have occupied, but from the services which her commercial skill, her naval science, and her spirit of foreign discovery, have performed for all the nations of the known world.

On the right of any state to limit the passage of strangers upon the main seas, a right which can arise only out of a dominion possessed by such a state over those seas, the law of nations is not laid down so clearly and consistently as it appears to be with respect to the last-mentioned right—of limiting the passage of strangers over *lands and navigable rivers or canals :* but the same principles which govern the former case seem to apply also to this. The chief doubt appears to have been occasioned by the difficulty of deciding whether the open seas be capable of any appropriation whatever. If they be not, there may be some difficulty in establishing the position, that any nation has a right to prevent the passage of foreigners by sea. But if, like lands, they may become the *property* of any state more competent than the rest to occupy and keep possession of them, then the right of *limiting the passage of foreigners* will follow, according to the reasonings above adduced, as a necessary result of the property in the waters. It has been frequently urged that the sea is *not* susceptible of *appropriation*, and that, by the law of nature, the sea is common to all mankind, like the light of heaven. But by the law of nature all things were *originally* common; and that community ceases only when particular individuals become powerful enough to occupy what they want, and retain the possession of it. In the progress of civilization, more and more appropriations occur. Wild animals, which among more barbarous nations are held to be the property of the first taker, become, in a more advanced state of society, a subject of valuable property. The light of heaven itself is a subject of property, and of property so distinct, that he who invades the light of another, by building too near his ancient windows, is guilty of an injury for which damages may be recovered. In the progress of mankind to civilization, what is most easily retained is first occupied: moveable property of all kinds, which can accompany the owner, and continue under his care. The soil, which can scarcely be retained without difficulty and expence, continues for a long time common property; till, at last, the advantages of exclusive appropriation are found to overbalance that difficulty

and expence, and the land, for the most part, becomes the property of individuals. The light itself, as we have seen, has been appropriated by the landholders. Where, then, has nature established the boundary? By what sign has she explained to us, that though goods and lands, and light and air, may become the property of a man, or of a set of men, yet the sea can never be reduced into property? At what point is the line to be drawn, between the things which *may* become property, and the things which *may not?* The reason why the sea has not been reduced into property very long ago, is simply this, that, until late years, no state has been strong enough to do it: just as in the early stages of society no individual was wealthy and powerful enough to enclose, cultivate, and preserve undisturbed possession of the land. All writers seem so admit, that there may be a property in *gulphs*, and even in streights, which are open at both ends. Thus *Grotius* (1), after speaking of the property which may be acquired in a river, continues: "By this instance it seems to appear, that the property and dominion of the sea might belong to him who is in possession of the lands on both sides, though it may be open above, as a gulph, or above and below, as a streight; provided it is not so great a part of the sea, that when compared with the lands on both sides, it cannot be supposed to be some part of them. And now what is thus lawful to one king or people, may be also lawful to two or three, if they have a mind to take possession of a sea thus enclosed within their lands; for it is in this manner that a river which separates two different nations has first been possessed by both, and then divided." According to this reasoning, Grotius himself must admit, that the Mediterranean sea is capable of being appropriated by the states whose lands encircle it: what may be appropriated by ten conjointly, may be assigned by them to one, or pass from their hands into the possession of one by right of conquest; and thus the Mediterranean sea may become the property of a single state. And if thus much be admitted, there is an end of the argument: for every sea, with reference to its shores, is at last mediterranean: and Grotius can scarcely be delivered from the dilemma by any reservation as to seas of so large extent, that they cannot be supposed to be part of the surrounding lands; for it is quite impossible to decide at what point a sea becomes so large, that it may no longer be considered as a part of the immense continents

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(1) Grotius, 162.

which may surround it. In another place (1), after quoting cases where the sea might be let into the land of a private person, and thus become his property, a practice very common amongst the Romans, Grotius reasons thus: "Now if a certain space of sea may be, as it were, an appurtenance to the ground of a private person, so far as it is shut up there, and so inconsiderable that it may be thought a part of the ground, and if this be not repugnant to the law of nature, why may not a part of the sea that is surrounded with the land belong to one or more nations, who are in possession of the shores, when that part of the sea is compared with the ground of a private person? Neither is it any objection to say, that the sea is not surrounded on all sides with the lands of one or more nations; for, notwithstanding that, it may be appropriated, as appears by the example of a corner of a river, or the sea, that is brought up to some gentleman's seat." He adds, however, that if the law of nations by common consent should agree to prohibit what thus seems to be permitted by the law of nature, it would not be competent to any particular people, during the existence of such a prohibition, to appropriate the sea to themselves.

With respect to this prohibition, and the right of any particular people to dispense with it, it may be observed, that though a state may have consented, during a long period, for the sake of general convenience, to any positive regulation, not necessarily enjoined by natural justice, she may withdraw her consent, and thus terminate the compact, when the same reasons of general convenience no longer prevail; *provided* that she do not so withdraw her consent, at *such* a *season* and under such circumstances, as to take an unfair advantage of her neighbours (2). He who should make an agreement with reciprocal conditions, and, after reaping *his* own share of the benefit, should, by refusing to perform his part of the contract, prevent his neighbours from reaping *their* share of it also, would be guilty of a manifest crime; but he who, without overreaching or making any gain upon false pretences, withdraws his name from the regulations of any society, fairly giving notice of his resolution to be bound by such regulations no longer, is doing that which by every law, human and divine, is justifiable as often as it may

(1) Grotius, b. 2, c. 3. s. 10.

(2) Ante. p. 164.

be prudent. Thus *Vattel* (1), in speaking of custom among nations, observes, " that if that custom is in its own nature *indifferent*, and much more if it be *useful* and *reasonable*, it becomes obligatory on all the nations in question, who are considered as having given their consent to it, and are bound to observe it towards each other, as long as they have not expressly declared their resolution of not observing it in future." Any nation therefore, for example *Great Britain*, having never consented to the principle that the sea shall be incapable of appropriation, or having given fair notice of her intention no longer to abide by so unnecessary an axiom, must appear, upon the principles of Grotius and Vattel, to be amply authorized by the laws of nature and reason in appropriating to herself a dominion over the seas. She may think fit still to leave the passage of the sea open to the world in general, and the sea will then be a matter of public use; but it will not thereby become common property.

After all the admissions that have been made as to the lawfulness of appropriating gulphs and streights, it becomes quite impossible for those who reason on the other side to draw any distinct line even on that part of the subject; for the proportion of the sea to the territory of any nation that borders upon it being made the measure of that nation's right to acquire an exclusive property in any part of such a sea, this proportion will always be variously estimated, according to the interest of the most powerful among the different states concerned in deciding upon the lawfulness of the appropriations. The sovereigns on the opposite borders of streights will each contend that his own share of contiguous territory entitles him either, by the length of its coast or by its internal extent, to a greater proportion of the water than any of the other states ought to claim; and the nations at the two extremities will contend that the territory of neither the one or the other claimant is sufficient to justify either in appropriating the streight. Thus there have been endless disputes even about the distance of sea to which every nation is entitled around its own shores; some have contended that each state is mistress of the sea on all sides within cannon-shot of her coasts, and for that reason a vessel taken within cannon-shot of a neutral fortress is not a lawful prize (2); others have

(1) Vattel's Prelim. s. 26. pp. 65, 66.

(2) Vattel, 128, 129. Marten's L. of N. 160. 2 Woodes. 443. Azuni, 52.

argued that the dominion extends for sixty miles outward on every hand. Surely the only clear, intelligible, and universal rule is, that the main sea and all other seas belong, like all other property, to those who, without fraud or unallowable violence, can occupy and secure them.

It must be admitted that there is a great contrariety of opinion among the most respectable writers. Grotius, Puffendorf (1), Vattel, Barbeyrac, and Azuni deny the right of appropriating the sea; and Selden and Bynkershoek as warmly uphold it. Puffendorf argues thus against the right of marine appropriation (2): "There can be no probable ground or colour alleged," says he, "why any one people should pretend to the dominion of the whole ocean, so as by virtue of this right to aim at excluding all others from sailing there. Not one of the reasons, which first moved men to the settlement of property, doth affect the main sea. To make it fit for navigation there is no need, in regard to the sea itself, of the pains and industry of men. The winds labour no more to drive all the fleets in the world than a single vessel, nor do those tracts which the keels plough up, make the way rougher to those that follow them. As for the passage to the other continent, this is not rendered less convenient to one nation, though another useth the same road." This passage comprehends two arguments with respect to the origin of separate property, deducing the rights of appropriation, first, from the supposed improvement effected by the industry of the appropriator; and secondly, from the probable injury which the occupant in certain cases would sustain from a universal participation of what he had originally taken for his own use. These, according to Puffendorf, are the reasons for the establishment of separate property in general; and neither of them, in his opinion, applies to the case of a property in the *sea*. This reasoning seems disputable; for, in the first place, though it be quite true that no industry be employed to fit the open seas themselves for navigation, yet it is by the industry and skill of the ship-builder and of the navigator that the seas are rendered useful and beneficial to mankind; and even if it were

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(1) In Azuni, vol. 1. p. 29. it is represented that Puffendorf was an advocate in favor of the exclusive dominion of the seas. In this work the different arguments will be found arranged.

(2) Puffendorf, b. 4. c. 5. s. 9. pp. 167, 8. See also Azuni, vol. 1. p. 3. to the same effect.

otherwise, yet it is by no means to be admitted, that improvement by industry is essential to the right of appropriating the gifts of nature. The savage who picks up a beautiful pebble, and adorns his person with it in its rude state, is as much the proprietor of that pebble, as a jeweller who, having purchased it, should polish and set it: otherwise, if improvement by industry were essential, no kind of occupation would be lawful till the improvement had actually taken place; and it would be competent to any other person to dispossess the original finder of the pebble, or of any other natural production that may be specified, at any time after the occupation, and before the improvement; so that the improvement, for want of a sufficient security, would never be effected at all. Again, if a tribe of savages, in an uncultivated district, should take possession of a space of land, to celebrate some festival or ceremony, would it be lawful for another tribe of that nation to dispossess them of the land because their festival or ceremony could produce no improvement in the quality of the soil? Indisputably such an expulsion would be an act of the greatest injustice: and as long as they can, in any fair method, keep possession of the land for an innocent purpose, so long the land is theirs, whether it be improved by their occupation or not. The same reasoning applies to the occupation of the sea. Again, it is urged by Puffendorf, that we do not, by the passage of our neighbours over the *seas* which we may have occupied, sustain any kind of inconvenience to ourselves, as we should if they were to pass over our *lands*; certainly we sustain no inconvenience as to the sea itself, because, as this author observes, those tracts which the keels plough up do not make the way rougher to those that follow them; but though not as to the sea itself, yet clearly as to the advantage resulting out of the sea, we sustain very material detriment by permitting the unlimited passage of our neighbours.

It is the observation of *Selden*, in his celebrated work on the dominion of the seas (1), " that navigation and commerce becomes the worse for him that owns it and others that enjoy it in his right, so that less profit ariseth than might otherwise be received thereby;

(1) Selden on Dominion of the Seas, b. 1 c. 22. pp. 141, 2; and see Vattel, b. 1. c. 23. s. 287—289. See Azuni, vol. 1. p. 28. as to the character of Selden's work, and the manner it was honored by the king.

which more evidently appears in the use of those seas which produce pearls, coral, and other things of that kind: yea, the plenty of such seas is lessened every hour; no otherwise than that of mines of metal, quarries of stone, or of gardens, when their treasures and fruits are taken away: and it is a custom of Mahometans to estimate their seas, no less upon this account, than by the revenue either of fishing or navigation." It is needless to enlarge on the disadvantages which we may sustain by permitting the unlimited passage of all our neighbours over the seas which we possess. We thus enable them to usurp the commerce which we should otherwise enjoy; we expose ourselves and our allies to dangers of war; we subject ourselves, in short, to a thousand mischiefs, which the law of nature in no way enjoins us to incur when we have the means of prevention in our own hands. Where no inconvenience is to be apprehended, then and then only is the liberty of passage a matter which we are bound in duty to afford. And, as we have before observed with respect to the passage of men and merchandize over the *landed territory* of a state; so in this case of passage over the *main sea* (1), where an inconvenience would accrue to ourselves from the freedom of passage, the freedom is not to be permitted: where *no* inconvenience would accrue, the freedom is not likely to be refused. For, as Puffendorf in another place observes (2), "There scarce appears any probable colour on which we should deny unarmed vessels the liberty of an open sea, which we are masters of, whilst they are bound towards a third people with whom we are at peace."

Some writers have endeavoured to distinguish the property in the sea from the jurisdiction over it; contending, that there may be a *jurisdiction* though there cannot be a *property*. This opinion is adopted by *Vattel*, who expresses himself as follows (3): "It is true, that the empire and the domain or property, are not inseparable in their own nature, even in a sovereign state. As a nation may possess the domain or property of a tract of land or *sea*, without having the sovereignty of it, so it may likewise happen that she shall possess the sovereignty of a place, of which the property or the domain, with respect to use, belongs to some other nation. But it is always presumed, that when a nation possesses the useful domain of any place whatsoever, she has also

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(1) Vattel, 128.

(2) Puff. b. 3. c. 3. s. 6. p. 29.

(3) Vattel, b. 1. c. 23. s. 295. p. 131; and Marten's L. of N. 157.

the higher domain or empire, or the sovereignty. We cannot, however, from the possession of the *empire*, infer with equal probability a co-existent possession of the *useful domain*, for a nation may have good reasons for claiming the *empire* over a country, and particularly over a *tract of sea*, without pretending to have any *property* in it, or any *useful domain*. The English have never claimed the property of all the seas over which they have claimed the empire." But *Bynkershoek*, in the 8th chapter of his dissertation De Dominio Maris (1), rejects this distinction as to all practical purposes, and with great reason. He observes, that " till it is proved by good reasons that the sea of its own nature is not susceptible of property, we may be allowed to say, that by taking possession of the sea, the same right is acquired as by taking possession of other things." " Jurisdiction and property," he adds, " are really distinct, in regard to goods contained in the lands of a state, as Seneca explains the matter, De Beneficiis, book 7. chap. iv. v.; but in regard to the *sea*, they are only two names for one and the same thing. If several persons, having at the same time taken possession of a sea, had appointed one of their number to command the rest, the property would then be distinct from the jurisdiction. But as there neither is, nor ever was, such a regulation, he who commands the sea and the real proprietor of it is the same person; so that whoever is master of a sea may, like the proprietor of all other things, sell that sea, exchange it, give it away; in short, dispose of it in any other manner, as he pleases, provided he transfers no more right than he himself hath; that is, that those who shall purchase such a sea of him shall keep their property no longer than they keep possession."

Molloy, a writer not perhaps of so high authority as those already cited, but by no means unworthy of attention, has this remarkable passage (2): " And as the sea is capable of protection and government, so is the same, no less than the land, subject to be divided amongst men, and appropriated to cities and potentates, which long since was ordained of God as a thing most natural; whence it was that Aristotle said, that unto *maritime* cities the *sea* is the *territory*, because from thence they take their sustenance and defence; a thing which cannot be, unless part of it might be appropriated in like manner as the land is, which is divided betwixt cities and governments, not by equal

(1) Note to Grotius, b. 2. c. 3. s. 13. p. 166. See Azuni, vol. 1. s. 4. p. 36.

(2) Molloy, vol. 1. b. 1. c. 5.

parts, or according to their greatness, but according as they are able to rule, govern, and defend them." This passage Molloy has adopted, though without any acknowledgment, from the report of the pleadings between the republic of Venice and the emperor Ferdinand, on the sovereignty of the Adriatic sea. (1)

It has been said that the sea is incapable of appropriation, because the occupation or possession can never remain uninterrupted. But, to constitute an uninterrupted possession, it is not necessary that every yard of the surface of the seas should be covered with British vessels; no possession, not even the possession of land, is strictly pervasive and perpetual. The actual occupation of a part, with the power of retaining the whole, is considered as the occupation of the whole, with respect to land: and why should not the same principle extend to the sea, which, in the quaint language of our own municipal law, is land covered with water? That possession which the owner can prevent others from disturbing, is a possession to all intents and purposes: the permanent keeping of a single bailiff unmolested on an estate, however large, or the permanent maintenance of a single squadron unsubdued on a sea, however extensive, is therefore the occupation of the whole estate, or sea, so appropriated. Molloy has a judicious argument on this part of the subject (2): "As it is a gift of God, that a land by the laws and public power be ruled, protected, and governed; so the same happens to the sea; and those are deceived by a gross equivocation, who aver, that the land, by reason of its stability, ought to be subjected, but not the sea, for being an inconstant element, no more than air: forasmuch as they intend by the sea and the air, all the parts of the fluid elements, it is a most certain thing that they cannot be brought under subjection and government, because whilst a man serves himself with any one part of them, the other escapes out of his power; but this chanceth also to rivers, which cannot be detained; but when one is said to rule over the sea or river, it is understood not of the element but of the scite where they are placed. The waters of the Adriatic and British seas continually run out thereof, and

(1) Selden on Dominion of Seas, at end of the treatise Mare Clausum, p. 15.

(2) Molloy, vol. 1. b. 1. c. 5. s. 6. This passage, like the last from Molloy, is copied almost verbatim from the report of the pleading between the Venetian Republic and the Austrian Emperor, at the end of Selden's Mare Clausum, p. 17.

yet it is the same sea; as the Tyber, Po, Rhine, Thames, or Severn, are the same rivers they were a thousand years since; and this is that, which is subject to princes by way of protection and government."

With respect to the sea near the coasts of any state, all the authorities agree that it is susceptible of property, and may to some extent be appropriated. Vattel observes (1), "It furnishes fish, shells, pearls, amber," &c. Now in all these respects its use is not inexhaustible, wherefore the nations to whom the coasts belong may appropriate to themselves and convert to their own profit an advantage which nature has so placed within their reach, as to enable them conveniently to take possession of it, in the same manner as they possessed themselves of the dominion of the land they inhabit. Who can doubt that the pearl fisheries of Bahrem and Ceylon may lawfully become property? and though where the catching of fish is the only object, the fishery appears less liable to be exhausted; yet, if a nation have on their coast a particular fishery of a profitable nature, and of which they may become masters, shall they not be permitted to appropriate to themselves that bounteous gift of nature as an appendage to the country they possess, and to reserve to themselves the great advantages which their commerce may thence derive, in case there be a sufficient abundance of fish to furnish the neighbouring nations? But, if so far from taking possession of it, the nation has once acknowledged the common right of other nations to come and fish there, it can no longer exclude them from it; it has left that fishery in its primitive freedom, at least with respect to those who have been accustomed to take advantage of it. The English not having originally taken exclusive possession of the herring fishery on their coasts, it is become common to them with other nations. A nation may appropriate to herself those things of which the free and common use would be prejudicial or dangerous to her. This is a second reason for which governments extend their dominion over the sea along their coasts as far as they are able to protect their right. It is of considerable importance to the safety and welfare of the state, that a general liberty be not allowed to all comers to approach so near their possessions, especially with ships of war, as to hinder the approach of trading nations, and molest their navigation. During the war between Spain and the United Provinces, James the 1st,

(1) Vattel, b. 1. c. 23. s. 287.

King of England, marked out along his coasts certain boundaries, within which he declared that he would not suffer any of the powers at war to pursue their enemies, nor even allow their armed vessels to stop and observe the ships that should enter or sail out of the ports. These parts of the sea thus subject to a nation are comprehended in her territory, nor must any one navigate them without her consent. But to vessels that are not liable to suspicion, she cannot, without a breach of duty, refuse permission to approach for harmless purposes, since it is a duty incumbent on every proprietor to allow to strangers a free passage, even by land, when it may be done without damage or danger. It is true, that the state itself is sole judge of what is proper to be done in every particular case that occurs; and if it judges amiss, it is to blame; but the others are bound to submit. It is otherwise, however, in cases of necessity; as for instance, when a vessel is obliged to enter a road which belongs to you, in order to shelter herself from a tempest. In this case, the right of entering wherever we can, provided we cause no damage, or that we repair any damage done, is a remnant of the primitive freedom of which no man can be supposed to have divested himself; and the vessel may lawfully enter in spite of you, if you unjustly refuse her permission. It is not easy to determine to what distance a nation may extend its rights over the sea by which it is surrounded. Bodinus pretends, that according to the common right of all maritime nations, the prince's dominion extends to the distance of thirty leagues from the coast. But this exact determination can only be founded on a general consent of nations, which it would be difficult to prove. Each state may, on this head, make what regulations it pleases, so far as respects the transactions of the citizens with each other, or their concerns with the sovereign: but between nation and nation, all that can reasonably be said is, that in general the dominion of the state over the neighbouring sea extends as far as her safety renders it necessary and her power is able to assert it; since, on the one hand, she cannot appropriate to herself a thing that is common to all mankind, such as the sea, except so far as she has need of it for some lawful end; and, on the other, it would be a vain and ridiculous pretension to claim a right which she were wholly unable to assert (1)." Azuni and other eminent authors consider that in the absence of express regulation on the subject between particular states, the natural dominion of the sea adjoin-

(1) Vattel, b. 1. c. 23. s. 289.

ing any state is limited to the distance that a ball from a cannon, or a bomb from a mortar, fired from the shore, usually calculated as three miles, would reach. (1)

It is however an established rule amongst nations, that where by the bending of the shores of a state, ports, harbours, gulphs, bays, and straights are formed, it should be supposed that a line is drawn from one of the most projecting points of the main land, or small islands near to it, to the other most projecting land of the same main land; and that the whole of the intermediate sea shall be considered as the territory of that state, although the middle thereof may much exceed three miles from the shore (2). But this rule, it is said, only applies to bays and straights of small extent, and not to those great tracts of sea, such as Hudson's Bay, and the Straights of Magellan, over which the empire cannot extend, and still less a right of property: but that a bay, whose entrance can be defended, may be possessed and rendered subject to the laws of the sovereign (3). So with respect to straights, when they serve as a communication between two seas, the navigation of which is common to all or several nations; the nation which possesses the straight cannot refuse the others a passage through it, provided that passage be innocent and attended with no danger to herself. By refusing it, without just reason, she would deprive those nations of an advantage granted them by nature, and indeed a right to them to such a passage, is a remnant of the primitive liberty enjoyed by all mankind: nothing but the care of his own safety can authorize the owner of the straight to make use of certain precautions, and to require certain formalities commonly established by the custom of nations. He has a right to levy a

(1) Azuni, vol. 1. pp. 57—59. Vattel, b. 1. c. 23. s. 289. Marten's L. of N. 162. Ante, 92. n. 2. The author of the poem Du Droit de la Nature, livre 5, lays down that rule in four well-known lines:

Tanto s'avanza in mar questo dominio,
Quant' esser può d'antemurale e guardia,
Fendove può da terra in mar vibrandosi
Correr di cavo bronzo acceso fulmine.

L'état qui veut régner sur la liquide plaine,
Sans la force n'aura qu'une puissance vaine,
Et la boulet lancé par le bruyant airain,
Assigne la limite au pouvoir souverain.

(2) Azuni, vol. 1. p. 60. Vattel, b. 1. c. 23. s. 290. Marten's L. of N. 163. 168.

(3) Vattel, b. 1. c. 23. s. 291. Marten's L. of N. 162. 171.

moderate tax on the vessels that pass, partly on account of the inconvenience they give, by obliging him to be on his guard; partly as a return for the safety he procures them by protecting them from their enemies, by keeping pirates at a distance, and by defraying the expense attendant on the support of light-houses, sea marks, and other things necessary to the safety of mariners. Thus the king of Denmark requires a custom at the streights of the Sound: such right ought to be founded on the same reasons, and subject to the same rules, as tolls established on lands, or on a river (1).

Of the British Seas.

Those parts of the seas which encompass the four sides of the British islands, and are therefore known by the name of the *British seas*, have long been under her actual control, and within the jurisdiction of her government, and as such are particularly recognized by the laws of England (2). This right has been recognized in the most solemn manner in repeated treaties by some foreign nations, and the acts of concession and acknowledgment which proved its being admitted, have been generally continued without interruption until of late times, when the practice of requiring them has been discontinued (3). The four seas over which Great Britain claims dominion, are denominated from the cardinal points of the compass. Toward the *East* is the German Ocean generally called the North, but by the Danes, Swedes, and other northen regions named the West Sea, and the boundaries on this side are the shores of those countries opposite to Great Britain that way, as the Netherlands, Germany, Denmark, and Norway. *Southward* is the British Ocean, so called by Ptolemy, one part of which is commonly denominated the Channel, or by the French La Manche, which divides England from France. This way the boundaries extend to the opposite shores of France (4), to those of Spain as far as Cape Finisterre, and to an imaginary line drawn from that Cape in the same parallel of latitude to their

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(1) Vattel, b. 1. c. 23. s. 292.

(2) As to the British seas in general, see Selden's Mare Clausum, b. 2. c. 1. p. 182. Molloy, b. 1. c. 5. s. 10. Postl. Dict. tit. Sea, British. Vattel, b. 1. c. 23. s. 289. Marten's L. of N. 164. Schultes on Aquatic Rights, 9, 10. Azuni, vol. 1. pp. 53—55. Berkley's Naval Hist. p. 442. Com. Dig. tit. Navigation, A. and tit. Prerogative, B. 1. 1 Rol. Ab. 528. l. 15. 3 Leon. 73. Co. Lit. 244. Any person born on such four seas is not an alien, Molloy, b. 1. c. 5. s. 14.

(3) Id. ibid. 2 Adolphus, 195.

(4) Id. ibid. 3 Leonard, 73. But the reason there assigned is because his majesty is king as well of France as England. See Vattel, b. 1. c. 23. s. 289. Azuni, vol. 1. 53—55.

boundary on the West, thus taking in that part of the British seas which consists of the Channel, the Bay of Biscay, and part of the Atlantic Ocean. On the *West* is that sea anciently called the Virgivian Ocean, which, where it washes the coast of Scotland, is from thence called Deucaledonian Sea; that part of it which flows between England and Ireland, is sometimes called the Irish Sea, anciently the Scythian Vale, but now Saint George's Channel; and the rest the Western Atlantic Ocean. *Northward* is the sea anciently known by the several names of Hyperborean, Deucaledonian, and Caledonian Ocean, now the Scotch sea, in which are situated the Orcades, Thule, and other islands. The proper boundaries of the British seas for the west and north on those quarters are generally reckoned a line drawn from the before-mentioned imaginary line, extending from the Cape Finisterre in the longitude of twenty-three degrees west from London, to the latitude of sixty-three degrees, and thence another line drawn in that parallel of latitude to the middle point of land called Van Staten in Norway, thereby taking in to the west that portion of them which consists of part of the Atlantic Ocean and the Irish Sea, or Saint George's Channel (1). The sovereignty or dominion of the British seas, consists in an exclusive property over them, as well with regard to passage as to fishing. The recognition of this sovereignty consisted in what was termed the *duty of the flag*, which was, that all ships or vessels met by British men of war on those seas do strike their flag and lower their topsail, or where they have no flag, that they lower their topsail only, in deference to his majesty's sovereignty, and an implied acknowledgment, that the prince grants a general licence for the ships of his friends to pass in those seas, paying him that duty. (2)

The effects of dominion over the sea in general.

The *effects* of dominion over the sea, when legally asserted, are many and beneficial: amongst the principal are, 1st, The exclusive right of fishing in such sea, and to all the produce of it, whether ordinary or accidental, as far as relates to things unclaimed by any other lawful proprietor. 2dly, The right to forbid or restrain the navigation of foreigners therein, and their entry into

(1) Selden's Mare Clausum, b. 2. c. 1. p. 182. Molloy, b. 1. c. 5. s. 10. Postl. Dic. tit. Sea, British. Molloy, b. 1. c. 5. s. 11; and see form of letters of instructions to officers to claim the duty of the flag. Postl. Dic. tit. Sea, British.

(2) See authorities ante, 101. n. 2.

his ports, unless declared *free ports* by treaty or usage,—a right of exclusion, however, which is seldom exercised in times of peace. 3dly, The right to impose duties, tonnage, &c.; fees of entry, of clearance, &c.; and to institute tolls for the benefit of his navigation. 4thly, The regular execution of justice, for protecting the innocent and punishing the guilty for all crimes committed within the extent of such sea dominion. 5thly, The right to demand of all foreign ships within those seas to strike the flag and lower the top-sail, or perform other customary maritime honours, to ships of war or others bearing the colours of the sovereign of such seas. (1)

Of pre-emption and other rights incident to dominion of the seas.

The rights of pre-emption, and of establishing staples, and of imposing tolls and other charges upon the commerce of foreigners, are of considerable importance, and are incidents to the right to refuse free passage. The right of *pre-emption* is the right of a nation to detain the merchandize of strangers passing through her territories or seas, in order to afford to her own subjects the *preference* of purchase (2). The right of *staple*, as exercised by a people upon foreign merchants, is defined (3) to be, that they may not allow them to set their merchandizes and wares to sale but in a certain place. This place is usually some port where the king's staple is established, where all goods may be rated, and whence they may be exported; staple signifying a heap, in allusion to those collections of various merchandizes which are crowded together in one port. The word is derived from the German, *stapulen*, which signifies to put into a heap or pile (4). With respect to the rights of *pre-emption* and *staple*, it seems clear that no such claims can in any case be justly founded, unless the state asserting them be entitled to refuse the freedom of passage. If this passage be a favour and not a right, then, according to the foregoing principles, these or any other reasonable conditions may, in natural justice, be imposed upon the allowance of that favour; if it be a right and not a favour, then the *imposition of a condition* is as gross an injury

(1) Marten's L. of N. 168, 9. 172—175. Molloy, b. 1. c. 5. s. 13. Postl. Dic. tit. Sea, British. Com. Dig. Navigation, A.

(2) In England, formerly, the king exercised such a power. 1 Bla. Com. 287.

(3) Barbeyrac; and see 1 Bla. Com. 314.

(4) Puff. b. 3. c. 3. p. 29, in notes. Jacob's Dic. tit. Staple. See Macpherson's Ann. Com. vol. 4. Index, tit. Staple.

as the denial of the right itself would be. On these rights of pre-emption, of staple, and of toll, *Puffendorf* thus expresses himself (1). "Thus much we must reasonably do: we may stop the vessel in such a case, and force them to leave the cargo in our territories, that we may have the benefit of the first purchase. For besides that the frequent passage of strangers may sometimes create danger, or at least may give suspicions to our state, what should hinder us from deriving that profit on our own people, which would otherwise be made by foreigners, since, in matter of favour, we ought constantly to prefer the former to the latter. And he asks again—why, since the foreigner has no right of excluding us from such a gain, we ought not to give ourselves the preference, and to be beforehand with him in the advantage; which we shall be if, whilst we lie thus in the midst between two people, we take care not to let such goods pass from one to the other, without going first through our own hands. And unless this be admitted for fair and equitable dealing, I see not on what grounds we can defend those staples and other rights which we find in some countries, by virtue of which foreign commodities are stopped and carried to the public place of sale; and strangers are permitted to traffic, not immediately betwixt themselves, but at second-hand with the natural subjects. Now, why *custom* should be imposed on goods carried over *land*, there is this manifest reason; because such heavy conveyance sometimes trespasses on the fields adjoining to the common roads, and because the sovereign of the country is put to charge, both in repairing the ways, and in securing the passengers; and further, if it be necessary to erect bridges for this purpose, it is plain in equity that the sovereign may set up a toll to reimburse himself for those expences; and at the same time he who does require such toll, is obliged not only to let the bridges stand, but likewise to keep them in constant repair. The like impositions are reasonable in those places where, by the industry of the natives, the roads are rendered more short or more easy; as by the filling up of pits and ditches, or by other useful labours for the convenience of passengers and of goods. Another reason which some bring to assert the equity of *impositions* on *land carriage*, is this; that by so perpetual confluence of strangers, the price of provisions is exceedingly raised. To which we may add in conclusion, that a sovereign on this account requires

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(1) Puff. b. 3. c. 3. s. 6. pp. 29, 30. 1 Bla. Com. 287.

some acknowledgment from the goods of foreigners, because he suffers them, by passing through his territories, to receive such goods immediately from a third people; whereas, should he erect a staple, the gain and benefit would be fairly intercepted by his own subjects.

" As to the *river tolls*, this, amongst other arguments, may be offered to justify them: that since the water, by continually preying on the adjoining lands, and sometimes by overflowing them, is the cause of no inconsiderable damage, for the prevention of which it is often necessary to secure them with banks and other works of great charge and labour; it seems by no means unreasonable that, towards the making up of those losses, some moderate consideration should be allowed by those who gain advantage by the river, without being concerned in its ordinary mischiefs."

Grotius speaks less decisively on this subject: he says (1), " It is questioned whether the sovereign of the country can impose a duty on goods that are transported either by land or upon a river, or some part of the sea which may be called an accessary to his dominions: now it is certain that equity does not permit the exacting of duty for goods which has no manner of relation to them; as it would be unjust to make strangers, who only pass through a country, pay a poll tax which is laid on the subjects to defray the charges of the state. But if one is obliged to be at any charge either expressly and merely for securing the transportation of goods, or amongst other things for that use, then, to recompense this, some duty may be laid on those foreign commodities, provided it be not higher than the reason of exacting it requires; for on *that* depends the justice of customs and taxes."

Vattel says (2), " The construction and preservation of bridges and canals being attended with great expence, the nation may very justly oblige all those to contribute to them who receive advantage from their use: this is the legitimate origin of the right of *toll*. It is just that a traveller, and especially a merchant, who receives advantage from a bridge, or canal, or a road, in his own passage, and in the more commodious conveyance of

(1) Grotius, b. 2. c. 2. s. 14. pp. 154, 5.

(2) Vattel, b. 1. c. 9. s. 103. p. 41.

his merchandize, should help to defray the expence of these useful establishments, by a moderate contribution; and if the state thinks proper to exempt the citizens from paying it, she is under no obligation to gratify strangers in this particular. But," continues he "the arbitrary or customary law of nations at present tolerates this abuse, while it is not carried to such an excess as to destroy commerce."

In speaking of the rights of staple, pre-emption, and toll, it has not been thought necessary to consider the question of carriage over the *territory* belonging to any state, separately from the question of carriage over the *sea* belonging to the same state; because, if we succeeded in proving that a property may be acquired as well in the *sea* as in the *land* or rivers, it will follow, that the rights which that property gives, namely, the rights of levying tributes and imposing conditions upon strangers for the use of what is ours, will be equally well founded in *maritime* and in *territorial* cases. The rights, therefore, of toll, pre-emption, and staple, we suppose to arise upon the *sea* as amply and advantageously as upon the *lands*.

How the freedom of trade is modified by treaties.

These are the principles which generally prevail with respect to the freedom of commerce and passage over the land, navigable rivers, and seas of a state, when there is no treaty regulating the subject; but, in modern times, we have seen that almost all the states of Europe have fixed a definite rule by express treaties with one or more particular states (1). Thus, by the treaty of 1786, between Great Britain and France in particular, it is declared, that there shall be a reciprocal and entirely perfect *liberty of navigation* and commerce between the subjects of each state, in all their kingdoms and territories, for all kinds of goods, in those places, upon the conditions, and in such manner and form, as in the following parts of the treaty are prescribed (2); and that the subjects and inhabitants of the respective dominions shall have liberty freely and securely, without licence or passport, general or special, by sea or by land, or in any other way, to enter, travel through, remain in, and return from the respective territories, and to buy and purchase as they please; conducting themselves, nevertheless, according to the laws, and in a peaceable manner (3). It is then provided, that the subjects of each state

(1) Ante, 38, 39.

(2) Treaty 1786, art. 1.

(3) Art. 4.

shall have leave to come with their ships, and goods on board, the trade and importation whereof are not prohibited by the laws of either kingdom, and to enter into every part of the country, ports, and rivers in Europe; and to remain there, and to have houses, or to lodge with others, and to buy freely, and to deposit goods in warehouses, and to expose them to sale, without being obliged to bring them to marts and fairs. Nor are they to be burthened with any imposition or duty, except those on ships and goods regulated by the treaty, or those to which the subjects of the two states shall themselves be liable. A tarif or list of duties is then fixed, and a prohibition of dealing in particular enumerated goods; and then follow other regulations conducive to the commercial objects of this treaty.

So by the general treaty between the king of Sardinia, Austria, England, Russia, Prussia, and France, of the 25th May 1815 (1), certain principles of regulation for the free navigation of certain rivers in Europe were fixed; and it was declared, that the navigation of a river which separates or traverses several states should, from the point where the same becomes navigable to its mouth, be entirely free, and shall not, in respect to commerce, be prohibited to any one; it being, however, understood, that the regulations with regard to the police of such navigation should be respected, as they would be framed alike for all, and as favorable as possible to the commerce of all nations.

(1) See Collection of Treaties of A.D. 1815, pp. 134, &c.

CHAP. V.

Of Subjects, Aliens, Denization, and Naturalization; and the Commerce of Aliens.

Of subjects and aliens.

UPON the before-mentioned principle, that a nation has a right to limit her own commerce, and to prohibit the intercourse of strangers with her subjects, depend the municipal regulations of the English law by which the commerce of *aliens* is affected, and which we will now proceed to consider. Some discrimination between citizens and foreigners, with different degrees indeed of rigour, has prevailed in the laws of all or most countries; and no jurist has ever yet attempted to maintain, that a foreigner can justly claim to be incorporated into the civil community of another state, and to enjoy the municipal rights of natural subjects (1). The law of this realm marks out with great clearness the characteristics by which *British subjects* are to be distinguished from *aliens*, and the various rights, immunities, limitations, and prohibitions, wherein aliens are peculiarly indulged or restricted. As the enactments and decisions upon this subject have no where been very amply detailed, and as they are of very great importance, in a commercial as well as in a political point of view, we will now consider them in detail, as far as they relate to the rights and liabilities of aliens in time of peace, reserving the consideration of the provisions relating to alien *enemies* and *neutrals* to that division of the subject in which it is proposed to inquire how the commerce of a country may be affected by the acts of foreign states during war.

Lord Coke, in his report of Calvin's case (2), thus divides the inhabitants of a state: Every man is either *alienigena*, an alien born, or *subditus*, a subject born: every alien is either a friend that is in league, or an enemy that is in open war:

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(1) Woodeson's Vin. Lect. 368. 2 Smith's W. N. 251, 2. Bac. Ab. Alien, C. by Gwillim, notes; but see Tucker on proposed General Naturalization Bill.

(2) 7 Coke's Rep. 17.

every subject is either *natus*, born, or *datus*, given or *made*: and from the whole report of Calvin's case, and from the elementary writers, it appears to be a general rule, that persons born within the allegiance, power, or protection of the crown of England are natural-born subjects; and that all who are *born* out of such allegiance, power, or protection, are aliens born, and continue aliens, unless afterwards made denizens or naturalized; and, consequently, those who are born in England, Scotland, Wales, and Ireland, or in his majesty's colonies or plantations, or on those parts of the ocean which are reputed the English seas, are not aliens, but natural-born subjects, and entitled to all the privileges and subject to all the duties of that character (1). The *principle* upon which this rule proceeds is, that since every man who is born within the king's allegiance, from the time of his birth, owes a natural allegiance to the crown, in return for the protection which the crown, as the guardian of all infants, affords him from the instant of his birth, and which debt of allegiance renders him incapable of receiving the advantages of a natural-born subject from any *other* state, it is but just that these advantages should be given to him by the state of which he is actually a native. It is therefore established, that even the children of aliens, if born under the *obedience* of the king, are natural-born subjects (2). Thus, if husband and wife, being natives of France, come into England, and here have issue a son, this son is a liegeman, that is to say, a natural-born subject, though his father and mother were aliens (3). There appears, however, formerly to have been one particular in which he was not upon an equality with other natural-born subjects: for by the course of the exchequer, the son of an alien, though born within the realm, being a merchant, was to pay the customs and duties as an alien for the first generation (4). However, this particular revenue distinction is now abolished (5), and the general rule remains unshaken which is laid down in Calvin's case (6), that whoever is born within the king's power or protection is no alien. And

(1) 1 Bla. Com. 366. 7 Co. 4 *b*. 19 *b*. 20 *a*. *b*. 22 *b*. 24 *b*. Vaughan's Rep. 279. 1 Ventris, 413. Com. Dig. Alien, A. B. Molloy, 237. Puff. *b*. 4. c. 5. s. 8.

(2) Jenk. 5 Cent. Case 91. where the difference between the English and the French law is noticed. 1 Bla. Com. 373, 4. But see 1 Wood. 386.

(3) Dyer, 224 *a*. Jenk. 5 Cent. Case 91. Hardr. 335. Macdonald's Case. Foster's C. L. 59. 1 Bla. Com. 373.

(4) Hardr. 335. Lit. Rep. 141. Com. Dig. Alien, C. 7. Hale's Tracts by Hargrave, 210.

(5) 24 Geo. 3. sess. 2. c. 16. s. 1.

(6) 7 Coke, 25 *a*.

lord Coke observes, that it is neither the climate nor the soil, but the liegeance and obedience, that make the subject born. It therefore is necessary to ascertain what shall be understood by the power, protection, or *allegiance* of the king (1). We will first consider the tenor of the *common* law on this subject, and then the alterations which *statutes* have subsequently introduced.

The strict rule of the common law seems to have been, that none were considered as born under the allegiance, power, or protection of the king; that is to say, none were admissible as *natural*-born, if they were not born in a place *actually possessed*, at the time of their birth, either by the king himself, or by some prince subject to him and doing him homage for it; except, first, the children of any subjects beyond sea, which subjects at the birth of those children should be in the service of the *crown* (2), as, for instance, embassadors, their attendants, and others: secondly, the sovereign's children born during the royalty of their parent (3); and thirdly and chiefly, the heir of the crown wherever born. The principle upon which the common law proceeded appears to have been this; that as no one can owe a natural allegiance to two independent sovereigns at once, and as every one owes a natural allegiance to the sovereign under whose allegiance he was born, it would be an inconsistency in the English law to admit as natural-born subjects of Great Britain persons born in the allegiance of an independent sovereign who may by possibility become the enemy of the British crown. Therefore it was thought necessary strictly to enforce the rule, that none but the children of subjects, who at the birth of such children were in the service of the crown, the sovereign's children born during the royalty of their parent, and the heir of the crown wherever born, should be considered as natural-born, unless they were born in a place actually possessed at the time of their birth by the king himself, or by some prince subject to him and doing him homage for it. We will analyse this rule, and illustrate it by a short reference to the authorities from which it has been collected. It was necessary that the claimant, not being the heir to the crown or the child of a subject beyond sea in the king's service, should have been born in a place actu-

(1) As to the import of the terms allegiance or legiance in general, see Calvin's Case, 7 Co. 25. and Co. Lit. 129 *a*.

(2) Dyer, 224 *a*. — Com. Dig. Aliens, B. 1.

(3) 25 Edw. 3. stat. 2.

ally possessed by the king himself, or by some prince subject to him and doing him homage for it.

If any particular place was within the dominion of the king himself, according to Mr. Justice Blackstone (1), it followed of necessity that every infant born in that place must by the common law be a natural subject, because he owed a natural allegiance in return for the protection which from the instant of his birth was afforded to him by the crown. If the place was within the dominion of some prince subject to the king of England, and doing him homage for it, still the same reason applies; for such a place, though not within the immediate dominion of the king of England, yet, according to Lord Coke, in Calvin's case (2), is still within the *fee* of the king, and consequently within his power, protection, and allegiance. So the Welch, before the annexation of their country by Edward I. were natural-born subjects at common law, as subjects to the princes of Wales, who were *homagers* to the king of England, (3). So were the Scotch in Edward the first's time, during the king of Scotland's homage to him and to other kings of England, as long as it continued. But it was necessary, by the rule we are examining, that the *place* from which the claim to the rights of a natural-born subject was deduced, should be *actually possessed* by the king or his feudatory prince; for if the sovereignty of that place be not a possession *de facto*, but only a dominion *de jure*, a person born within the king's territory may by nature owe another and closer allegiance to another sovereign, who is king *de facto*. Though, says Lord Coke, in the case of Calvin (4), the king of England hath absolute right to other kingdoms or dominions, as France, Aquitain, Normandy, &c. yet seeing the king is not in actual possession thereof, none born there since the crown of England was out of actual possession thereof, are subjects to the king of England. And again, in the same page (5), Lord Coke declares, that " if enemies should come into any of the king's dominions, and surprise any castle or fort, and possess the same by hostility, and have issue there, that issue is no subject of the king, though he be born within his dominions, for that he was not born under the king's legiance or obedience. As, on the one hand, persons thus born within

(1) 1 Bla. Com. 369.
(2) 7 Co. 21 *b*.
(3) Vaugh. 281.
(4) 7 Co. 18 *a*. Com. Dig. Aliens, A.
(5) 7 Co. 18 *a*, *b*. Com. Dig. Aliens, A.

a part of the king's territory not in his *actual possession* are to be deemed aliens, so on the other hand it is laid down (1), that "if the king of England enter with his army hostilely the territories of another prince, and any be born within the places possessed by the king's army, and consequently within his protection, such person is a subject born to the king of England, if from parents subjects, and not hostile." It was further indispensable that the *place* thus required to be actually possessed by the king or his feudatory prince should be possessed at the *time* of the *children's birth*; for otherwise such children would have owed to the sovereign actually possessing that place at their birth a natural allegiance, which they could not have shaken off in favour of any previous or subsequent possessors. Thus Lord Coke goes on to state, that (2) the time of his birth is of the essence of a subject born; for he cannot be a subject of the king of England, unless at the time of his *birth* he was under the legiance and obedience of the king. And that is the reason that *antenati* in Scotland (for that at the time of their birth they were under the legiance and obedience of another king) are aliens born, in respect of the time of their birth. And again in the same case it is said, *he* cannot be a subject of one kingdom that was born under the legiance of a king of another kingdom, albeit afterwards one kingdom descend to the king of the other.

With respect to the above-mentioned exceptions allowed by the common law in favour of children of the king's subjects born beyond sea, who at the birth of such children should be in the *service* of the king; as for instance, embassadors, their attendants, and others, it will easily be perceived that these exceptions proceed upon the very same principle with the rule itself. For as an embassador and his suite do not owe even a local allegiance to the sovereign into whose country they are sent, and continue in the allegiance only of their own sovereign, whom indeed the embassador represents, their children born under such circumstances are not in the protection of the sovereign in whose territory they are born, and therefore owe him no natural allegiance. So that there was no reason, even at common law, against acknowledging them as natural-born subjects of the British sovereign, to whom natural allegiance was really owing from

(1) Vaugh. 281. 286. 2 Vent. 6. (2) 7 Co. 18 *b*.

them. And accordingly lord Coke, in Calvin's case (1), distinctly declares the exception in these words: If any of the king's ambassadors in foreign nations have children there of their wives being English women, by the common law of England they are natural-born subjects; and yet they are born out of the king's dominions. And that the children of ambassador's attendants are specifically included within the exception in favour of ambassadors, has been expressly decided by lord Holt; who declared (2), that a person may be born at Roan, and yet *infra legiantiam Angliæ*, within the legiance of England, as if attending on an ambassador. In like manner, the allegiance of other subjects beyond sea, in the *service* of the king, continues uninterrupted; and therefore the children of such subjects, equally with the children of ambassadors and their attendants, shall enjoy the privileges of natural-born subjects. And in the Rolls of Parliament, 17 Edw. 3., we find (3) that it was resolved "by all the lords, that children of subjects beyond the sea, in "the *service* of the king, shall be inheritable." By the statute 25 Edw. 3. stat. 2. *de natis ultra mare* (of persons born beyond sea), it is declared, that the exception in favour of the king's children was always a part of the law of the crown of England. And the reason is the same as in the last exception: for if the children born beyond sea, while their parents are in the king's service, are deemed to be within the allegiance of the king, *a fortiori* the children of the king himself, wherever born, must be within the king's allegiance. But in order to give effect to the exceptions in favour of children born beyond sea, whose parents were subjects in the king's service, it was necessary that those parents should be in that service at the very time of the birth of such children. This may be gathered from the language of the Roll of Parliament of 17 Edw. 3., which says, that children of subjects born beyond the sea, in the service of the king, shall be inheritable. If it were otherwise, every such child, at the time of his birth, would have owed to the sovereign, in whose territory he was born, a natural allegiance, which no subsequent embassy or employment of his parents could have enabled him to shake off. There is no decision shewing whether persons claiming as the king's children may be deemed natural-born subjects, if their father

(1) 7 Co. 18 *a*. Calvin's Case. Cro. Car. 601. March, 91. Jenk. Cent. 3. b. 1. p. 166.

(2) Anon. Comberbatch, 212.

(3) See note in Dyer, 224 (*a*). n. 29.

was not king at the time of their birth: but it should seem that in this case they must all be deemed aliens, except the immediate heir to the crown; and that even he must be deemed an alien until the moment when the crown devolves upon him. For the words of enactment as to the king's children, seem to apply only to the inheritance of the crown itself. "The law "of the *crown* of England is, and always hath been such, that "the children of the kings of England, in whatsoever parts they "be born, in England or elsewhere, be able and ought to bear "the *inheritance* after the death of their ancestors." Even the heir of the crown, until the crown devolves upon him, seems to owe a natural allegiance to the foreign monarch in whose dominions he is born, which he cannot retain consistently with his allegiance to the British kings; which nevertheless he ought not to be permitted to shake off until his actual succession to the crown; because, perhaps, by death, or other events, the crown may never devolve upon him at all. But as soon as the crown does devolve upon him, then he becomes emancipated from the foreign allegiance; because no allegiance at all can ever be due fr omone independent sovereign to another.

It may seem a hardship, where an English father and an English mother have a son, the father residing in England, but the mother being abroad at the time of the infant's birth, that such infant should have been considered as an alien at common law: but as there is no authority to establish that he would have been held a natural-born subject, it must be concluded that the rule of the common law was, that none were admissible as natural-born, if they were not born in a place actually possessed at the time of their birth, either by the king himself, or by some prince doing homage to him for it: except, first, the children of any subjects born beyond sea, who at the birth of those children should be in the service of the crown; secondly, the sovereign's children born during the royalty of their parent; and thirdly, and chiefly, the heir of the crown wherever born. (1)

But various *statutes* have now, in favor of foreign commerce, broken through these rules; and many descriptions of persons are

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(1) But see Vattel's L. N. § 215. p. 102. Vin. Ab. Alien, A. 2. By the French law, if an English husband and wife have issue there, such issue is alien; but it is otherwise in our law. Jenk. 1st Cent. Case 2.

now to be considered as born within the power, protection, or allegiance of the king, who came under none of the denominations defined by the *common law*; the first alteration was made by the statute 25 Edw. 3. stat. 2., which, after declaring what was the common law with respect to the heirs of the *crown*, and enacting that certain persons therein mentioned by name, who had been born abroad, should be from thenceforth able to have and enjoy their inheritance after the death of their ancestors in all parts within the legiance of England, as well as those that should be born within the same legiance, which is the highest privilege of a natural-born subject, proceeded to make this further enactment, "that all children inheritors which from henceforth shall be born without the legiance of the king whose *fathers and mothers* at the time of the birth be and shall be at the faith and legiance of the king (or to translate the original French more correctly, "be and shall be within the fealty and of the allegiance of the king") of England, shall have and enjoy the same benefits and advantages, to have and bear the inheritance within the same legiance, as the other inheritors aforesaid in time to come: so always that the mothers of such children do pass the sea by the licence and wills of their husbands." Brooke indeed says, that persons born beyond sea of English parents were inheritable at the common law; but this seems contrary to the general opinion, and Brooke himself confesses that the point is made clear by the statute (1); since which enactment it is clear that if a merchant or other British subject continue beyond sea to merchandize, and has issue there by an English woman, his wife, such issue shall inherit (2). So it is said if the wife be an alien, for she is *sub potestate viri*, and by the common law *partus sequitur patrem* (3). But it was otherwise if the parents went or stayed beyond sea without licence. (4)

By the statute of 7 Ann. c. 5. (5) it was enacted, "that the children of all natural-born subjects born out of the legiance of her majesty, her heirs and successors, shall be deemed, adjudged, and taken to be natural-born subjects of this kingdom, to all intents, constructions, and purposes whatsoever." It will be

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(1) Bro. Ab. Descent, pl. 47. tit. Denizen, pl. 6. Vin. Ab. Alien, A. 2. pl. 1. 7. 12. 15. Vattel's L. N. § 215. p. 102. Cobbett's St. Tri. 585. Jenk. 1 Cent. Case 2.

(2) Cro. Car. 601. Com. Dig. Aliens, B. 1.

(3) Id. ib.

(4) Cro. Eliz. 3. 1 Sid. 108. Com. Dig. Aliens, B. 1.

(5) And see 10 Ann. c. 5.

observed that the word *legiance* is in this act used in a sense rather different from that in which it is generally taken: for here it signifies to be born out of the king's *domain*; in ordinary parlance it signifies to be born out of the sphere of *that duty* which is owing to the king as sovereign of England. In the preamble to the statute of the 13 Geo. 3. c. 21., the word *legiance* is used in the sense of domain, and the term *allegiance*, which is the very same word, is used as the *duty* owing to the king. In order therefore to avoid confusion it is necessary to observe, that though legiance or allegiance is the word sometimes employed to signify domain, yet when we state it as a rule, that those only who are born without the allegiance, power, or protection of the king are aliens, we mean those who are born beyond the sphere of the *duty* owing to the king as king of England, not those who are born without the king's *domain*, because we have seen, both by common law and by statute, many are born out of the king's allegiance in the sense of *domain*, who are not born out of his allegiance in the sense of *duty*. (1)

The statute of 4 Geo. 2. c. 21. explains the above-mentioned clause in the statute of Anne, by enacting "that all children born out of the legiance, that is out of the *domain* of the crown of England, or which shall hereafter be born out of such legiance, whose *fathers* were or shall be natural-born subjects of the crown of England or of Great Britain at the time of the birth of such children respectively, shall and may, by virtue of the said recited clause in the said act of the seventh year of the reign of her said late majesty, and of this present act, be adjudged and taken to be, and all such children are hereby declared to be, natural-born subjects of the crown of Great Britain, to all intents, constructions, and purposes whatsoever." But this enactment does not extend to the children of any father who at the time of their birth was liable, in case of his return, to the penalties of treason or felony, or was in actual service of any foreign prince then in enmity with the crown of England. (2)

The statute of 13 Geo. 3. c. 21. after reciting that it is expedient that not only the children of such natural born subjects as reside abroad, but their children also, should continue under

(1) As to the import of the terms legiance and allegiance, see Calvin's Case, 7 Co. 4 *b.*, &c. 1 Co. Lit. 129 *a.*

(2) 4 Geo. 2. c. 21. s.

the allegiance of his majesty, (that is of course not within the domain but within the obligation of the *duty* owing to the king), enacts that all persons whose *fathers* by the statute of the 4 Geo. 2. are entitled to the rights of natural-born subjects, shall be adjudged natural-born subjects also; thus the provision which by the act 4 Geo. 2. extended only to the children of natural-born subjects are by this act 13 Geo. 3. extended to the *grandchildren* also.

But it is provided that this act shall in no way affect the statute of the 5 Geo. 1. c. 27., which declares, that any of his majesty's subjects being *artificers* or *manufacturers* who shall exercise or teach his trades in any foreign country, and not return within six months after warning given by any authorized person, shall be deemed an alien. The statute of 13 Geo. 3. c. 21. also contains a specification of the steps to be pursued by a person desirous of taking the benefit of its enactments. However, Mr. Justice Blackstone informs us (1), that the *grandchildren* comprehended within this act are not privileged in respect of the alien's duty, except they be protestants, and actually reside within the realm, nor shall be enabled to claim any estate or interest unless the claim be made within five years after the same shall accrue. (2)

This statute and several others contain provisions for confirming the rights of natural-born subjects, to persons born abroad before certain periods therein particularly stated: but as those periods are all so long elapsed that scarcely any persons can now survive who could be benefited by the provisions, it is not necessary to notice them in detail.

The 14 & 15 Hen. 8. c. 4. enacted, that even Englishmen sworn subjects to foreign princes should pay the same customs and impositions as other strangers of the parts where such Englishmen should inhabit. But this is not noticed in the statute of 14 Geo. 3. c. 84. which relates to the same subject; and the alien duty, we have seen, has been repealed. (3)

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(1) These create a condition precedent. 1 Bla. Com. 373.

(2) 1 Bla. Com. 373. But the 24 Geo. 3. sess. 2. c.16. repeals the aliens duty, though not the right of the city of London to the duty called scavage. 1 Bla. Com. 316. note 24. Mr. Christian's edit.

(3) 24 Geo. 3. sess. 2. c. 16.

The statute 9 Ann. c. 21. § 53. enacts, that all such persons as shall be born on board any of the ships of war or other ships to be employed in or about the trade of the South Sea Company; or who shall be born in any of the places which shall be discovered or possessed by the said company, or any of their dependencies, shall be adjudged to be born within the allegiance of his majesty, and shall have all the privileges of a natural-born subject.

Under the before-mentioned 25 Edw. 3. stat. 2. the following case was decided:—The father of Joseph Colt and his mother *enceinte*, inhabiting in Calais when it was taken by the French, fled into Flanders, and there the woman was delivered of the said Joseph: and it was adjudged that he shall be a denizen, because the parents were born at Calais, and he himself was begotten there, although born in Flanders (1). But the word *denizen* is here employed very incorrectly, as it frequently is in the older statutes, to signify not an alien made denizen by the king's letters patent, or other legal process, which, as we shall presently see, isthe strict and proper sense of the word, but a person entitled to the privileges of a *natural-born* subject. In this case Joseph Colt came within the precise words of the statute, his father and mother being, at the time of his birth, within the fealty and of the allegiance of the king. Under the statute of Edward, as explained by the more modern enactments, which we have enumerated, it is sufficient that the *father* or even *grandfather* of a child were entitled to the privilege of a natural-born subject, without regard to the origin of the *mother* or *grandmother*. But it is not sufficient *e converso*, that the *grandmother* or even the *mother*, be a natural-born subject, unless the father or grandfather were natural-born also (2). This was decided in the case of Doe on the demise of Duroure against Jones (3). Henrietta Knight, a natural-born subject, quitted the kingdom, and married count Duroure, an alien, by whom she had a son, born abroad; and the question was, whether this son was capable of inheriting lands in England, as heir to his mother: Lord Kenyon said, that supposing there existed any doubt respecting the meaning of the statute 25 Edw. 3., yet the subsequent statutes which had been passed relating to this subject, operated as a

(1) Colt's Case. Dyer, 224. Aliens A.

(2) 1 Ventr. 422. Com. Dig. Ab. Aliens, A. note (a).

(3) 4 T. R. 300. But see Bac.

parliamentary exposition of it; particularly the statute 4 Geo. 2. c. 21., which had closed the question, by enacting, that all children born out of the legiance of the crown of Great Britain, whose *fathers* were natural-born subjects, should be deemed natural-born subjects: and also the statute 13 Geo. 3. c. 21., which extended the same privileges to grandchildren, but still confined them to the *paternal* line. From which it clearly followed, that a person born in foreign parts, and of a *foreign father*, did not derive inheritable blood in this kingdom. The celebrated decision that the natives of a state newly annexed to the British dominions, if they be born subsequently to that annexation, shall be considered as natural-born subjects, was pronounced in Calvin's case, to which we have already so often referred (1).

From this examination of the principles of the common law, the relaxations introduced by the statutes, and the leading decisions thereon, we collect that the rule is, that persons born within the allegiance, power, or protection of the crown of England, are natural-born subjects; which words, allegiance, power, or protection, at this day embrace not only persons born within the dominions of his majesty, or of his homagers, and the children of subjects in the *service* of the king abroad, and the king's children, and the heirs of the crown, all of whom were natural-born subjects by the *common law*, but also, under the *statutes* above mentioned, all persons, though born abroad, whose fathers or grandfathers by the *father's* side were natural-born subjects at common law, unless the father or paternal grandfather, through whom the claim is made, was at the time of the birth of such children liable, in case of his return into this country, to the penalties of treason or felony, or was in the actual service of any foreign prince then at enmity with the crown of England: excepting always from the benefit both of the common law and of the statutes, those artificers and manufacturers who are declared aliens by the 5 Geo. 1. c. 27.

It is necessary to be understood, that whenever we have spoken of rights claimed from the king's territory, or by the service of the king beyond sea, we have viewed the king only *as king* of *Great Britain.* For persons born in transmarine territories belonging to the king in any other right than in the right of the

(1) 7 Coke, p. 1. Bac. Ab. Aliens, A.

English crown, as, for instance, the Hanoverians, and persons doing service to the king as officers of such transmarine territories, are obviously not included within the meaning of the common law. The accuracy of this construction is established by the reasoning in the case of Craw and Ramsey (1). It being thus established, that persons born within the allegiance, power, or protection of the crown of England, are alone entitled to be considered as natural-born subjects; it will be readily perceived, that all other persons are aliens unless they be made denizens, or naturalized.

Of Denization.

The meaning of the word *denizen* in law has been not a little perplexed by the indiscriminate employment of it to signify both a natural-born subject, and an alien legally invested with some of the privileges to which a natural-born subject is entitled. The only signification in which the word can be properly employed, is that of an alien who has been legally invested with *some* of the privileges to which a natural-born subject is entitled (2). This he may be for life or for years, or to him and the issue of his body, or to him and his heirs generally, or for a particular purpose, or on condition (3). *Denizen*, said lord Bacon, in his speech as counsel for Calvin, is sometimes confounded with a natural-born subject: and he proposes to use the word denizen in its legitimate sense. "A denizen" (says he), "is one that is but *subditus insitivus*, or *adoptivus*, a subject engrafted or adopted, and is never by birth, but only by the king's charter, and by no other mean, come he never so young into the realm, or stay he never so long. Mansion or habitation will not indenize him; no, nor swearing obedience to the king in a leet, which doth in law the subject; but only, as I said, by the king's grace and gift. To this person the law giveth an ability and capacity abridged not in matter, but in time. And as there was a time when he was not subject, so the law doth not acknowledge him before that time. For if he purchase freehold after his denization, he may take it; but if he have purchased any before, he shall not hold it; so if he have children after, they shall inherit; but if he have any before, they shall not inherit." So also speaks Mr. J. Blackstone, where he says, that for defect of hereditary blood the

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(1) Vaughan, 286.

(2) Co. Litt. 129 a. says it has sometimes been employed to signify natural-born subjects.

(3) Com. Dig. Aliens, D. 1. Bac. Ab. Aliens, B.

issue of a denizen born *before* denization cannot inherit to him, but his issue born *after* may (1). Indeed, even the denizen himself is incapable of inheriting lands: for his parents, through whom he must make his claim, being aliens, and therefore having no inheritable blood themselves, could convey none to their offspring. And even the king himself is incapable of imparting an inheritable quality to the blood of an alien, by the letters of denization or in any other method, that power belonging to parliament alone by act of naturalization (2). But a denizen has this advantage over an alien, that he may, after his denization, take and hold lands by *purchase* or by *devise*, which an alien can never do: for the conveyance by purchase or by devise has no relation to time past, as the course of descent and inheritance necessarily has, but refers merely to the time present; and at the time present the person who was an alien is become a denizen, and invested from that moment with all the inheritable rights of a natural-born subject which can by possibility subsist without relation to a prior point of time. (3)

Besides the rights of inheritance, there are other rights which natural-born subjects enjoy, and in which denizens are not permitted to participate. Thus by 22 Hen. 8. c. 8. and by some other statutes of the same king, denizens were compelled to bear certain pecuniary burthens; and they were subject to the aliens duty, while that duty continued unrepealed (4). The statute 32 Hen. 8. c. 16. enacts, that all aliens made denizens shall be obedient to the statutes of the realm; and that in the letters patent of denization, a proviso shall be inserted that they shall be so; but it has been held that this proviso does not make a condition, but only subjects the denizen to punishment if he violate the law (5). Every denizen, unless born of English parents (in which case, by the statutes before enumerated, he would be a natural-born subject), is prohibited by the 12 & 13 W. 3. c. 2. from being a member of the privy-council, or of either house of parliament; and he cannot enjoy any office or place of trust, civil or military, nor receive any grant of lands from the crown.

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(1) 1 Bla. Com. 374. Com. Dig. Alien, C. 1. and D. 1. Bac. Ab. Aliens, B.

(2) Palmer's Rep. 14.

(3) Com. Dig. Aliens, D. 2. 1 Bla. Com. 374.

(4) Ante, 117. n. 2.

(5) 1 Rol. Ab. 195. Com. Dig. Alien, D. 1. Bac. Ab. Aliens, B.

These latter regulations appear to have originated in a prudent jealousy of king William's partiality to foreigners; for as the power of making denizens is a part of the royal prerogative; it became exceedingly important to restrict a prince of foreign extraction within close and impassable limits. It appears, indeed, that the right of making denizens is not exclusively vested in the king; for it may be by parliament: but in point of fact, it is scarcely ever exercised by any but the royal power. Denization, says lord Coke, in Calvin's case, may be effected in three ways: by parliament, as it was in 3 Hen. 6. c. 55. in dower; by letters patent, as the usual manner is (1); and by conquest, as if the king and his subjects should conquer another kingdom or dominion, as well *antenati* as *postnati*, as well they who fought in the field as they who remained at home for defence of their country, or employed elsewhere, are all denizens of the kingdom or dominion conquered (2). But though there thus appear to be other authorities by which denization may be effected concurrently with the royal prerogative, yet, as we find from lord Coke (3), the right of the king to make denizens, when he chooses to exercise it, cannot be delegated to another; this being what Mr. Justice Blackstone denominates it, a high and incommunicable branch of the royal prerogative: and as lord Bacon in his speech for Calvin expresses it, the king may exercise it by his charter absolutely of his prerogative and power, wherewith law and parliament intermeddle not. And when we thus consider the nature and consequences of such a prerogative, and the illegality of all interference by either house of parliament against the pleasure of the king, we shall feel the necessity of the statute of Will. 3., by which the king and the parliament together freely consented to the settlement of this prerogative on the basis on which it is now established.

In all respects, except as to the disabilities which we have specified, a denizen stands on the same footing with a natural-born subject. At present, therefore, he may be considered, as Blackstone has expressed it (4), to be in a kind of middle state, between an alien and a natural-born subject, and to partake of both of them. The British law not only protects those aliens

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(1) See form, post, vol. 3.

(2) 7 Co. 6 *a.* 2 Vent. 6. Com. Dig. Aliens, D. 1. 1 Bla. Com. 374.

(3) Calvin's Case, 7 Co. 25 *b.* Com. Dig. Aliens, D. 1.

(4) 1 Bla. Com. 374.

who have become entitled to the privileges of denizens in this country, but also respects the rights of those who have been declared denizens of foreign states. Thus, in the case of Wilson and Marryatt (1) it was decided, that a natural-born subject of England having been admitted a denizen of the United States of America, is entitled as such denizen to the benefit of the treaty between England and the United States, which authorizes the trade of Americans to the territories of the British East India Company; although, as an *English* subject, he would not have been permitted to carry on such a commerce.

Of Naturalization.

We now come to speak of the more ample and advantageous mode in which an alien may become entitled to the privileges of a natural-born subject; namely, by act of *naturalization* (2), and which can only be effected by parliament (3) A person naturalized is, as the phrase itself imports, one admitted to a participation of the rights of natural-born subjects; and therefore it is said *naturalization*, unlike denization, establishes the alien naturalized, *to all intents* and purposes, upon the same footing with natural-born subjects, as if he had been born within the king's legiance; so that he may purchase lands, inherit them, and transmit them by descent, as if he had been born within the king's allegiance (4). However, the words "to all intents," and other phrases of similar import, seem to be used a little too largely; since, as we shall presently see, there are some disabilities to which the native of a foreign state continues liable even after naturalization.

Naturalized persons are of two classes: of the first class are all foreigners who obtain a *particular* act of parliament to naturalize them *individually*; of the second class are those foreigners who become naturalized *ipso facto* on complying with the conditions pointed out in certain *general* statutes. As to the *first* class, which consists of persons naturalized by an act of parliament relating only to themselves as *individuals*, it is not necessary to make any particular observations: because these are matters of private rather than public concern; and the rights of

(1) 8 T. R. 31. 1 Bos. and Pul. 430.

(2) As to naturalization in general, see Chalm. Col. Op. 382, &c. Com. Dig. Aliens, B. 2. 1 Bla. Com. 374.

(3) 1 Vent. 419. Cro. Jac. 539. Co. Lit. 129 *a*. Com. Dig. Aliens, B. 2. Chal. Col. Op. vol. 2. p. 382.

(4) Id. ibid.

each party so naturalized must depend on the tenor of the individual enactment by which he obtained his naturalization (1). The general rules are, that if an alien be naturalized he shall inherit as if he had been born within the king's legiance; for naturalization cancels all defects, and is allowed to have a retrospective energy, which simple denization has not (2); and if a man take an alien to wife, and afterwards sell his land, and his wife be naturalized, she shall be endowed of the lands sold before her naturalization (3); and if a man be naturalized, his brother or his son born before shall inherit (4). Naturalization is not, as denization may be, merely for a time, but is absolutely for ever, and not for life only, or to him and the heirs of his body, or upon condition. (5)

The *second* class of naturalized persons consists of those foreigners who become naturalized *ipso facto* on complying with the conditions pointed out in certain *general* statutes. Their privileges obviously rest on more public foundations, and consequently require to be traced with somewhat more of specific explanation. Many arguments have been urged, that in favour of trade, and to encourage foreign merchants and traders to settle in this kingdom, a general naturalization act for all protestants should be enacted (6): and such an attempt was once carried into execution by 7 Ann. c. 5.; but that statute, after three years experience of it, was repealed by 10 Ann. c. 5., except the beforementioned clause for naturalizing the children of English parents born abroad. The first act of parliament now in force, is the 15 Car. 2. c. 15., which, after making several provisions for enabling aliens to exercise the trade, occupation, or mystery of breaking, hickling, or dressing of hemp or flax; as also for making and whitening of thread; as also of spinning, weaving, making, whitening, or bleaching of any sort of cloth whatsoever made of hemp or flax only; as also the trade, occupation, or mystery of making twine or nets for fishing, or of stowing of cordage; as also the trade, occupation, or mystery of making any sort of tapestry hangings; enacts, that all foreigners that shall really

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(1) See general form, post, last vol.

(2) Co. Lit. 129 *a*. 2 Bla. Com. 250.

(3) Co. Lit. 33 *a*.

(4) Co. Lit. 129 *a*. 1 Vent. 419. 2 Rol. 93.

(5) Cro. Jac. 539. Co. Lit. 129 *a*. 2 Rol. Rep. 95. Bac. Ab. Aliens, B.

(6) Tucker's Essay on Trade, 84, &c. and Tucker's History of the Naturalization Bill, &c.

and *bonâ fide* set up and use any of the trades and manufactures aforesaid, by the space of three years in England, Wales, or Berwick-upon-Tweed, shall from thenceforth, upon taking the usual oaths, enjoy all privileges whatsoever as the natural-born subjects of this kingdom. Next in the order of time is the act of 13 Geo. 2. c. 3., which by the preamble appears to have been passed for the better encouraging of foreign mariners and seamen to come and serve on board ships belonging to this kingdom, and by which foreign seamen serving for two years during war on board English men of war or merchant ships, are naturalized *ipso facto*. But it is provided, that such naturalization shall not enable the party to be of the privy-council, or a member of either house of parliament, or to take any office or place of trust, either civil or military, or to have any grant of lands, tenements, or hereditaments from the crown to himself, or any other person in trust for him. Then follows the statute 13 Geo. 2. c. 7. (1), by which all foreigners who have resided seven years in any of his Majesty's colonies in America, without having been absent longer than two months at any one time, are naturalized on taking the oaths, making the declaration, and receiving the sacrament, as therein prescribed; subject nevertheless to the same proviso as the last-mentioned statute. The statute 20 Geo. 2. c. 44. extended the benefit of the last-mentioned act to the Moravian brethren, and to all foreign protestants conscientiously scrupulous of taking an oath. By the statute of 22 Geo. 2. c. 45, foreign protestants are naturalized upon serving three years on board any ship fitted out as therein mentioned, and employed in the whale fishery; but they lose this benefit if they go out of the king's dominions in England, Ireland, or the American plantations, for more than twelve months at any one time. The 26 Geo. 3. c. 50. s. 24. 27, 28., and 28 Geo. 3. c. 20. s. 15., provide that every foreigner who has established himself and his family in Great Britain, and carried on the southern whale fishery, and imported the produce thereof for the space of five years successively, shall be entitled to all the privileges of a natural-born subject. And the stat. 2 Geo. 3. c. 25. naturalized foreign protestants serving two years in the Royal American regiment, or as engineers in America. None of these acts, however, extend to naturalize any persons whom the before-mentioned statute of 4 Geo. 2. c. 21. excludes from the benefits of its provisions, as being the children

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(1) Com. Dig. Aliens, B. 2.

of any father who at the time of their birth was liable, in case of his return, to the penalties of treason or felony, or was in actual service of any foreign prince then in enmity with the crown of England. The stat. of 7 Jas. 1. c. 2., 13 Geo. 2. c. 7., 20 Geo. 2. c. 44. and 22 Geo. 2. c. 45. prescribe the forms of oaths, declarations, and other ceremonies to be taken and observed by persons claiming to be naturalized by virtue of the provisions which we have considered.

But it must not be understood that the persons naturalized by these statutes are placed on the *same* footing with English subjects *to all intents* and *purposes* (1). They are all by the statutes that confer the privilege, as well as by the stat. of 12 & 13 W. 3. c. 2. prohibited from being members of the privy-council, or of either house of parliament, and from enjoying *any office or place, civil or military*, or any grant from the king of lands within the kingdom of Great Britain and Ireland. In general, therefore, a person naturalized is not eligible to the office even of constable (2). The stat. 1 Geo. 1. st. 2. c. 4. § 2. goes still further; for it enacts, that no bill of naturalization shall be received without a clause to this effect; and therefore when any foreigner distinguished by eminence of rank or services is naturalized, it is usual first to pass an act for the repeal of these statutes in his favour, and then to pass an act of naturalization without any exception (3).

From the construction the stat. 13 Geo. 3. c. 25. has put upon the statutes for naturalizing persons resident in the colonies or serving in America, it should appear that persons naturalized by any of the preceding acts, except that of 13 Geo. 2. c. 3., may enjoy any offices, places, or grants of lands not in Great Britain or Ireland. The power to hold offices, places, and grants in any place out of Great Britain and Ireland, rests however only on the express mention of Great Britain and Ireland in the respective statutes in which they are contained: for the words of the act 12 & 13 W. 3. c. 2., and of the act 1 Geo. 1. stat. 2. c. 4. which confirms it, are absolutely general, and prohibit the holding of any offices, places, or grants of lands, without any reservation as to territories out of Great Britain or Ireland; therefore, as

(1) Co. Lit. 129 *a.* note 1.

(2) 5 Burr. 2788.

(3) Co. Lit. 129 *a.* n. 1. See form of such act, post, last vol.

the words Great Britain and Ireland are not inserted in the statute of 13 Geo. 2. c. 3. for naturalizing foreign seamen serving two years during war in English ships, we may conclude that such seamen are incapable of holding offices, places, or grants either in or out of Great Britain or Ireland. The disabilities which these two acts of 12 & 13 Will. 3. and 1 Geo. 1. have enforced as the conditions of naturalization, may be traced to the same source as the disabilities annexed to denization, namely, to the jealousy of King William's partiality for foreigners, which we have just noticed; perhaps such jealousy will appear more necessary in the instance of denizens than in that of naturalized persons, because no one can be naturalized by the mere act of the king; but when we consider the superior nature of the privileges which are vested by an act of naturalization, we shall see no reason to regret that the provisions extending to one class of foreigners have been made to embrace the other also.

These are not the only restrictions, for by 14 Geo. 3. c. 84. (1) it was enacted, "that no bill of naturalization shall be received without a clause or proviso to declare that the person to be naturalized shall not thereby obtain, or become entitled to claim, within any foreign country, any of the immunities or indulgencies in trade which are or may be enjoyed or claimed therein by natural-born British subjects, by virtue of any treaty or otherwise, unless such person shall have inhabited and resided within Great Britain, or the dominions thereunto belonging, for the space of seven years subsequent to the first day of the session of parliament in which the said bill of naturalization shall have passed, and shall not have been absent out of the same for a longer space than two months at any one time during the said seven years: and that no bill of naturalization shall hereafter be received in either house of parliament, unless such clause or proviso be first inserted or contained therein." It may not be uninteresting to commercial men to know the reason which induced the legislature to make this enactment: it had been found, as the preamble of the act itself declares, that many persons born out of the allegiance of the crown of Great Britain obtained bills of naturalization for the purpose of availing themselves in foreign countries of the immunities and indulgencies belonging to his Majesty's trading subjects, by treaties or otherwise; and in order

(1) Com. Dig. Aliens, B. 2.

to apply the said immunities and indulgencies to promote the trade of the country to which the persons so naturalized originally belonged, and not with any design of fixing their residence in Great Britain, or of becoming useful subjects thereof. The parliament considered that it was neither just nor expedient to permit these abuses; and the requisition of residence for seven years accordingly passed into a law. (1) In all respects, except as to the disabilities which we have specified, a person naturalized stands on the same footing with a natural-born subject.

There is but one mode in which foreigners can be naturalized, either individually or generally, and that mode is an act of parliament (2). It will be readily perceived that persons naturalized by these acts are placed on a very different footing from persons declared to be natural-born subjects by the acts which we have enumerated in considering the characteristics of a natural-born subject; the acts which we then enumerated were framed but to revive a natural right which absence had annulled; the acts which we have last recapitulated are meant to confer a favor entirely new. The former acts restored the natural subjects of the king; the latter acts introduced the subjects of foreign states; and accordingly the statute 12 & 13 W. 3. c. 2. exempts children born abroad of English parents, from the disabilities imposed upon persons naturalized by the last-recited acts. It is hardly necessary to repeat, that all who are not natural-born subjects, nor denizens, nor naturalized persons, are necessarily *aliens*.

The practice of thus incorporating foreigners into a community by denization or naturalization, is not peculiar to the English constitution: and though the stranger thus adopted becomes a subject of the state which welcomes him, yet he does not release himself from his natural allegiance to the government under which he was born. "Our laws," (said Eyre C. J. in delivering judgment on a writ of error in the Exchequer Chamber in the case of Marryatt and Wilson (3),) "pronounce, that if there

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(1) See Debrett's Deb. vol. 3. p. 124. Bac. Ab. Aliens, B. 1 Bla. Com. 316.

(2) Co. Lit. 129 *a*. 1 Vent. 419.

(3) 1 Bos. & Pul. 443; and see 1 Bla. Com. 370. Bac. Ab. Aliens, A. 1 Woodeson, 382.

should be war between his parent state and the state which has adopted him, he must not arm himself against the parent state. Perhaps they go further, and say, that if he is here he may be prevented from returning to his domicile in the state which has adopted him: that if he is there, he must, on receiving the king's command under his privy seal, return hither on pain of incurring a contempt, and penalties consequent upon it (1)." And the principle of this decision will be found in the following eloquent passage of Mr. Justice Blackstone: "Natural allegiance is such as is due from all men born within the king's dominions, immediately upon *their birth*. For immediately upon their birth they are under the king's protection, at a time too when (during their infancy) they are incapable of protecting themselves. Natural allegiance is therefore a debt of gratitude which cannot be forfeited, cancelled, or altered by any change of time, place, or circumstance, nor any thing but the united concurrence of legislature; that is, of course, not the legislature of the adopting state, but the legislature of the state where the individual in question was born. An Englishman who removes to France or to China, owes the same allegiance to the king of England there as at home, and twenty years hence as well as now: for it is a principle of universal law, that the natural-born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former; *nemo potest exure patriam* (2): for this natural allegiance was intrinsic and primitive, and antecedent to the other; and cannot be devested without the concurrent act of that prince to whom it was first due. Indeed the natural-born subject of one prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another; but it is his own act that brings him into these straits and difficulties, of owing service to two masters; and it is unreasonable that, by such voluntary act of his own, he should be able at pleasure to unloose those bands by which he is connected to his natural prince (3)." A remarkable and interesting instance of this nature occurred in the case of Angus Macdonald, who, though born in Great Britain, was, during his earliest infancy, removed into France, and there continued and received his entire education

(1) Vaughan, 279.

(2) 1 Bla. Com. 369. Foster's C. L. 59. 184. 1 Rol. 195. Com. Dig. Alien, A.

(3) 1 Bla. Com. 369. Foster's C. L. 59. Dyer, 298 *b*. 300 *b*. Bac. Ab. Aliens, A. Naturalizations in a foreign country without licence will not discharge a natural-born subject from his allegiance. 2 Chalm. Col. Op. 363.

and employment, and had no connexion with England; and having obtained a commission in the French army, was taken prisoner by the English, fighting against his Majesty's forces, and tried and found guilty of high treason, though afterwards pardoned upon certain conditions (1). Again, Mr. J. Blackstone observes (2), "*Local* allegiance is such as is due from an alien, or stranger born, for so long a time as he continues within the king's dominion and protection; and it ceases the instant such stranger transfers himself from this kingdom to another. *Natural* allegiance is *perpetual*, *local* allegiance is only *temporary*; and that for this reason, evidently founded upon the nature of government; that allegiance is a debt due from the subject upon an implied contract with the prince, that so long as the one affords protection, so long the other will demean himself faithfully. As therefore the prince is always under a constant tie to protect his natural-born subjects at all times and in all countries; for this reason their allegiance due to him is equally universal and permanent. But, on the other hand, as the prince affords his protection to an alien only during his residence in this realm, the allegiance of an alien is confined, in point of time, to the duration of such his residence, and in point of locality, to the dominions of the British empire."

But though a natural-born subject cannot voluntarily emancipate himself from his natural allegiance, so as to exempt himself from the *duties* incident thereto, yet he may, by his violation of law, forfeit many of the advantages of a natural-born subject, and place himself in the situation of an alien. Thus it was enacted, that if an English subject go beyond the seas, and there become a sworn subject to any foreign prince or state, he shall during his residence abroad pay such impositions as aliens do, with a proviso, that if he returns and lives here he shall be restored to his liberties and privileges (3); and a more recent statute provides, that if any artificer or manufacturer of Great Britain shall go into a foreign state, and there exercise or teach his art to foreigners, and shall not return within six months after warning from the British minister or ambassador, he shall be deemed an alien. (4)

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(1) Foster's C. L. 59. 184.
(2) 1 Bla. Com. 370.
(3) 14 & 15 Hen. 8. c. 4.
(4) 5 Geo. 1. c. 27. And see next chapter, as to the effect of a British subject, who has sworn allegiance to a foreign state, being deprived of the advantages of a British-born subject.

HAVING thus endeavoured to explain the various characteristics and privileges of *British subjects*, whether subjects by birth or aliens who may have become subjects by *denization* or *naturalization*; we will now consider the *privileges* and *disabilities* to which *aliens* are entitled or subject, in Great Britain. The *common* law of this country has always been jealous of foreigners: from the conquest till upwards of two hundred years afterwards it does not appear that strangers were permitted to reside in England, even on account of commerce, beyond a limited time, except by a special warrant; for they were considered only as sojourners coming to a fair or market, and were obliged to employ their landlords as brokers to buy and sell their commodities; and we find that one stranger was often arrested for the debt or punished for the misdemeanor of another, as if all strangers were to be looked upon as a people with whom the English were in a state of perpetual war, and therefore might make reprisals on the first they could lay hands on (1). It was said by Lord Coke, in Calvin's case (2), "that a monarch, or an absolute prince, as owing no allegiance to the English crown, cannot come into England without licence of the king; and that in ancient time, no *ambassador* came into this realm before he had a safe-conduct; for as no king can come into this realm without a licence or a safe-conduct, so no prorex, which representeth a king's person, can do it." And it appears from the same author (3), that by the ancient kings, amongst whom Alfred was one, it was forbidden that any alien merchant should make his haunt in England except at the four fairs, or sojourn in the land beyond *forty* days. In the *Mirror* (4) it is said, that the stay of alien merchants shall not be to the prejudice of the towns or merchants of England, and there shall be oaths to the king and pledges, if they stay more than forty days (5). And at this day, even those aliens who are private subjects of a nation *at peace* with us, are liable to be sent home whenever the king sees occasion. (6)

(1) Tucker's Remarks on Naturalization Bill, 2, 3. 13—15. 2 Inst. 204. Rymer's Fœdera, vols. 1, 2, 3, 4. 1 Anders. Hist. Com. 237. 242.; where it is said that in A. D. 1276 it was a general rule in England, that the aggregate body of every particular nation of foreigners residing here, were obliged to answer for misdemeanors of every individual person of their number: and as to the former ill treatment of foreigners in general, see 1 Anders. 242, 243. Tucker per tot.

(2) 7 Co. 21 *b*. 4 Inst. 155.

(3) 2 Inst. 57.

(4) Mirror, c. 5. s. 5.

(5) Mirror, c. 3. s. 8. quoted 2 Inst. 63.

(6) 1 Bla. Com. 260. post. 113. 56 Geo. 3. c. 86.

In favor of *commerce*, however, some of the restrictions upon aliens were very early relaxed. Thus a law was made by king Ethelred, that all ships of *merchants*, even *enemies*, entering any port from the sea, without stress of weather, should enjoy undisturbed peace (1). The prerogative of the crown over aliens was greatly abused by king John, who converted it into an instrument for extorting exorbitant duties from foreign merchants; and therefore, that such disgrace might no longer continue, it was enacted in Magna Charta (2), that "all *merchants* (if they were not openly prohibited before) shall have their safe and sure conduct to *depart* out of England, to come *into* England, to tarry in, and go through England, as well by land as by water, to *buy* and *sell* without any manner of evil tolts, by the old and rightful customs, except in time of war: and if they be of a land making war against us, and such be found in our realm at the beginning of the wars, they shall be attached without harm of body or goods, until it be known unto us, or our chief justice, how our merchants be intreated there in the land making war against us; and if our merchants be well intreated there, theirs shall be likewise with us." Sir Edward Coke (3) says, that it is provided by this statute, "that all merchant strangers in amity (except such as be so publicly prohibited), shall have safe and sure conduct in seven things: 1st. To depart out of England; 2d. To come into England; 3d. To tarry here; 4th. To go in and through England, as well by land as by water; 5th. To buy and to sell; 6th. Without any manner of evil tolls; and, 7th. By the old and rightful customs." And Sir Edward Coke observes (4), that the *public* prohibition of alien merchants to which the statute refers, must be by common or public council of the realm, that is, by *act of parliament*, for that it concerneth the whole realm, and is implied by this word *publice*. And it is to be further remarked upon this chapter of Magna Charta, that it exempts the alien merchant from all evil tolls, and entitles him to trade according to the ancient and rightful customs. "Tolls," says Sir Edward Coke (5), "signify, in a general sense, any manner of custom, subsidy, prestation, imposition, or sum of money demanded for exporting or importing of any wares or merchandizes, to be taken of the buyer. They are called *mala tolneta*, evil tolls, when the thing demanded for wares or mer-

(1) 2 Inst. 57.
(2) Magna Charta, and see 9 Hen. 3. c. 30.
(3) 2 Inst. 57.
(4) Ibid.
(5) 2 Inst. 58.

chandizes, do so burthen the commodity as the merchant cannot have a convenient gain by trading therewith, and thereby the trade itself is lost or hindered; and in divers statutes, *maletout* for *maletot*, *maletout* is a French word, and signifieth an unjust exaction." Within the words of the statute, *omnibus malis tolnetas*, all evil tolls, he insists, that new impositions laid on by the *king* are included, and are called evil tolls, as opposite to ancient and rightful customs, or subsidies granted by authority of parliament. And here we may observe that the words ancient and rightful *customs*, are understood by Sir Edward Coke to denote, not the usages or customs of the kingdom, but the impositions levied for *the revenue*. In earlier times, when the extent of the prerogative was undefined, it was considered a branch of the royal power to impose upon the merchandize of aliens such tolls as were not evil, but for the advancement of trade and for the public good. But when the liberties of the realm were fixed at the revolution, it was enacted (1), "that levying money for or to the use of the crown, by pretence of prerogative without assent of parliament, for longer time or in other manner than the same is or shall be granted, is illegal:" so that now, no tax or custom can be imposed upon *alien merchants* but by the same authority which binds the natural-born subjects of the British empire, the legislature;—and thus the provisions of Magna Charta in favor of *foreign* traders, which we have been stating and analysing, are now endowed with a force and efficacy which they could never have possessed, amid the ceaseless fluctuations of the prerogative, in the uncertain ages of the constitution. "It is somewhat extraordinary," says Mr. Justice Blackstone (2), "that these provisions should have found a place in Magna Charta, a mere interior treaty between the king and his natural-born subjects; which occasions the learned Montesquieu to remark, with a degree of admiration, 'that the English have made the protection of foreign merchants one of the articles of their national liberty.' But, indeed, it well justifies another observation which he has made, that the English know better than any other people upon earth, how to value at the same time these three great advantages, religion, liberty, and *commerce*." (3).

(1) 1 W. &. M. sess. 2. c. 2. s. 1.; and see 2 Anders. Com. 69, as to ancient assumption of power by Henry 8.

(2) 1 Bla. Com. 260, 261.

(3) 1 Bla. Com. 260, 261. We shall find, however, from the following enactments, and from

In the reign of Edward the First, aliens were enabled to proceed summarily for their debts (1), and by charter they were permitted to hire houses of their own, and to dispose of their goods themselves to the best advantage (2). The stat. of 2 Edw. 3. c. 9. confirms Magna Charta, by enacting that all *merchants*, strangers, and privy, may go and come with their merchandizes into England, and buy and sell as they please, after the tenor of the Great Charter (3). And it was enacted by 9 Edw. 3. st. 1. c. 1., "that all *merchants* strangers and others might deal in all things vendible within the realm, and sell to any but the king's enemies, notwithstanding any franchises or usages to the contrary, save the king's customs." And persons disturbing alien merchants in the protection given by this statute, are subjected to double damages (4). To this enactment, however, was added an exception, forbidding aliens to carry *wine* out of the realm. By the statute of the Staples 27 Edw. 3. st. 2. c. 17. the disgraceful practice of arresting one alien for another's debt was put an end to, and time given for aliens, in case of war, to remove with their effects. It was enacted (5), that a merchant stranger shall not be impeached for another's debt but upon a good cause; merchants of enemies' countries shall sell their goods in convenient time and depart; and that no merchant stranger shall be impeached for another's trespass, or for another's debt, whereof he is not debtor, pledge, nor mainpernor: Provided always, that if our liege people, merchants, or others, be endamaged by any lords of strange lands, or their subjects, and the said lords duly required fail of right to our said subjects, we shall have the law of marque, and of taking them again, as hath been used in times past, without fraud or deceit; and in case that debate do rise (which God defend) betwixt us and any lords of strange lands, we will not that the people and merchants of the said lands be suddenly subdued in our said realm and lands, because of such debate,

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Tucker on Trade and Naturalization, that many of the regulations respecting aliens do not appear to justify this observation.

(1) 11 Edw. 1. Stat. de Mercatoribus. 1 Anders. Hist. Com. 242.

(2) 12 Edw. 1. and 31 Edw. 1. Tucker on Naturalization Bill, 3. 5. Rymer, vol. 4. p. 361. 1 Anders. Hist. Com. 268.

(3) Tucker on Naturalization, 9. 1 Anders. Hist. Com. 268, 9.

(4) This act confirmed by 25 Edw. 3. 27 Edw. 3. See observations on this act, Tucker on Naturalization Bill, 7—13.

(5) 27 Edw. 3. st. 2. c. 17. Tucker on Naturalization Bill 15—17.

but that they be warned, and proclamation thereof published, that they shall void the said realm and lands, with their goods, freely, within forty days after the warning and proclamation so made: and that in the meantime, they be not impeached, nor let of their passage, or of making their profit of the same merchandizes, if they will sell them. And in case that, for default of wind, or of ship, or for sickness, or for other evident cause, they cannot avoid our said realm and lands within so short a time, then they shall have other forty days, or more, if need be, within which they may pass conveniently with selling their merchandize as aforesaid. And by 36 Edw. 3. c. 7. a court was constituted, composed partly of foreigners, to try mercantile causes, and other regulations in favour of alien merchants were passed (1). In the succeeding reign of Richard II., he deprived the foreigner of the liberty of buying and selling of or to any other foreigner within the precinct of London: but by two subsequent statutes of the same reign, the several statutes of Edward III. in favour of aliens were explained and confirmed; and in 14 Ric. 2. (2) it was expressly enacted, "that merchant strangers repairing into the realm of England shall be well and courteously and rightfully used and governed in the said realm, to the intent that they shall have the greater courage to repair into the same." But in the year 1392, a statute was passed depriving merchants strangers of the benefit of selling to another merchant stranger; and it was likewise ordained, that no merchant stranger should sell by retail, but only in gross; they, merchant strangers, were not allowed to put or expose to sale any manner of wares or merchandize, except livings and victuals (3). In the 5th Hen. IV., A. D. 1103 (4), it was provided, "that all merchants aliens and strangers shall sell their merchandizes brought into this realm within a quarter of a year next after their coming into the sam[e] and also that the money, which shall be delivered by exch[ange] in England, be employed upon the commodities of the r[ealm] within the said realm, upon pain of forfeiture of the same m[oney] and that no merchant alien nor stranger sell any man[ner] [of] merchandize to any other merchant alien or stranger, [upon] pain of forfeiture of the same merchandize." And "that [in] every city, town, and port of the sea in England, where the [said] merchants aliens or strangers be, or shall be repairing, su[ffi]-

(1) 1 Anders. Hist. Com. 347.
(2) 14 Rich. 2. c. 9.
(3) Tucker, 19, 20, 21.
(4) 5 Hen. 4. c. 9. Tucker, 22, 23.

cient hosts shall be assigned to the said merchants by the mayor, sheriffs, or bailiffs; and that the said merchants aliens and strangers shall dwell in no other place but with their said hosts so to be assigned; and that the said hosts so to be assigned shall take for their travel in the manner as was customed in old time." By th tenor of this law, a merchant stranger was not only deprived of the benefit of selling to another merchant stranger, who was to sell again within the realm, according to the statute of Richard the Second, but also he was restrained from selling at all to merchants strangers, though for the purposes of exportation. So that it became a crime by the laws of the land, to attempt to make this country the centre of trade, and a magazine for other nations. And yet this unhappy national bias, joined with the narrow selfish views of individuals, prevailed so strongly, that this very absurd clause was confirmed again by a statute made the next year, the 6 Hen. 4. c. 4. There was indeed a repeal of the obligation laid upon foreigners to sell their merchandizes within a quarter of a year after importation; but particular care was taken to add, "saving always the franchises and liberties of the city of London; and further provided always, that the said merchants aliens and strangers shall not carry or cause to be carried out of the realm, any merchandizes brought within the realm by the merchants aliens and strangers aforesaid." This was strengthening the evil; so that even our own shipping were not to be employed in carrying the goods of foreigners from one country to another. By a subsequent statute (1) however, in the same reign, after reciting the inconveniences incident to the restraint on aliens, it was enacted, "that as well the drapers and cloth-sellers as other merchants with their sundry merchandize, shall be free to sell in gross their cloths, iron, oil, and wax, and other their merchandize, as well to all the king's liege people as to the citizens of London, notwithstanding any franchise or liberty to the contrary." But if this act seemed (2) to open the door for foreigners to enter in again, effectual care was taken by statutes made in the following reigns to shut it up: one of these acts proceeded so far as to ordain that no Englishman shall within this realm sell or cause to be sold hereafter to any merchant alien any manner of merchandizes, but only for ready payment in hand, or else in merchandizes for merchandizes, to be paid and contented in hand, upon pain of forfeiture of the same; this

(1) 7 Hen. 4. c. 9. Tucker, 24, 25.

(2) Tucker, 25, 26.

law was made in the year of our lord 1429, and the 8th of Henry VI. c. 24. but being of a nature too absurd and extravagant to be put in practice, was repealed in the following sessions. In the commencement of the reign of Richard III. a most impolitic act was passed, which, after most absurd recitals of imaginary grievances, enacted that a stranger was never to sell by retail, nor to be an host or landlord to any other but to a fellow-countrymen; aliens were to sell their merchandizes within eight months after their arrival, and to lay out the money so received in buying the commodities of the country, yet they were not allowed to buy or sell wool or woollen cloth, nor to make wool into cloth, nor deliver wool to others for that purpose nor were even the king's natural-born subjects to make cloth, for aliens, under pain of forfeiture of the said cloth: aliens were to take no apprentices or servants but the king's natural-born subejcts; and if any alien artificers or handicraftsmen should come into the realm after a limited time, they were to return into their own country, or submit to become servants to the English of the like occupation. Yet, as necessity is always ingenious, the strangers found means to elude a great part of these penalties, by getting themselves made denizens by virtue of the king's prerogative: therefore, in the beginning of the next reign, (Henry VII.) as this was looked upon as a favorable juncture, application was made, and a bill obtained, " that if strangers were made denizens, they were to reap no privileges from that grant." The unfavorable consequences of these pernicious regulations appear from the preamble of the statute 19 Hen. 6. c. 6., and has been clearly pointed out by a celebrated author (1). Foreigners being expelled by the effect of these enactments, and no recruits suffered to come in, the native English soon commenced monopolists, and raised the price of their manufactures upon their fellow subjects, which was attended with three very fatal consequences: viz. 1. The cloth imported from abroad could be had at a cheaper rate than what was made at home, and whosoever sells cheapest, whether he be foreigner or native, will always have the preference at market. 2dly. The *English* journeymen and lower manufacturers, who had been the most noisy in their clamors against foreigners, being now destitute of work at home, were glad to retire to foreign countries to seek for employment; they then found to their cost, that the *expulsion* of foreigners was the cause of taking the bread out of their mouths,

(1) Tucker on Naturalization Bill, 37.

not the admission of them. 3dly. The consumption of provisions growing less every day on these accounts, there was no encouragement to the farmers and landed gentlemen to raise any thing but numerous flocks of sheep, which they were sure would turn to good account by the demand for wool in Flanders: and so great was the decay of the woollen and all other manufactures, that the very remembrance seems to have been lost among us. The country thus impoverished, we find the tide in favor of aliens and commerce turned by the influx of foreign workmen and artificers who took refuge in England in the reign of Elizabeth, attributable to the persecution of the Duke d'Alva (1). But these foreigners were rather permitted than encouraged; and when king James came to the throne, the citizens of London preferred petitions against aliens; and the rules and orders made in consequence of their solicitations were injurious to them, as well as quite opposite to the nature of a free, open, and extensive trade (2). In the commission dated the 5th of June 1622, his majesty saith, "he would endeavour to keep such a due temperament between the interests of the complainants, and that of foreigners, that the latter should have no cause to fear being disturbed in their industrious and sedulous courses, whereof he wished his own people would take example." But this seeming indulgence ends in real oppression, as may be seen by the two succeeding clauses (3). "And further our will and pleasure is, that every such stranger born, denizen or not denizen, or others born of parents strangers, not having served their apprenticehoods as aforesaid, who either use any manual or handicraft trade, or the buying or selling of the home commodities of our kingdom, shall pay to our use, as a thankful acknowledgment of our royal favour, such rates and payments, out of their earnings or gains, to be distributed and disposed of for the ease and comfort of our own people as we shall think fit, as shall be directed by a schedule, to be subscribed by our own hand; or in default thereof, such rates or payments as our said commissioners, under their hands, or under the hands of three of them, shall set down: whereby our natural-born subjects may discern that we put a proportionable difference between them and the strangers, if their own want of industry, or honest workmanship, be not the impediment. Nevertheless, our pleasure and command is, that this favour which we shall

(1) Tucker, 38, 39. H[illegible]

(2) Tucker, 41.

(3) Tucker, 42.

thus vouchsafe to extend to such strangers, who have settled themselves and their families in this our realm already, or to such who by their service, according to our laws, shall hereafter deserve the like favour, shall not draw hither or continue here any increasing number of masterless men of handicraft trades, to the extreme hurt both of the English and strangers; but that such either speedily return into their own countries, or put themselves to work as hired servants, according to the true meaning of our laws, or else shall undergo the severity of our laws provided and in force against them." Then comes a third, in relation to the persecuted French protestants, which is too curious to be omitted; and the reader will not pass it over without making his own remarks upon it. "Notwithstanding, our will and pleasure is, that unto such of the French nation who by reason of the late troubles in that kingdom (when there was a league on foot to extirpate all the protestants) have had their refuge hither, there shall be showed such favour beyond the proportion of other strangers, as our commissioners shall *think fit*, if, within a convenient time, after these troubles shall be overblown, they shall return into their own country again." Thus stood the matter in the reign of king James I. The deep-rooted national prejudice, joined to a grasping desire of monopoly, spurred on the English, especially the citizens of London, to seek the expulsion of all foreigners concerned in commerce; and to bar up the way against their entering in for the future. The power likewise of granting monopolies, as well as the payments made for such exclusive privileges, suited the taste and the circumstances of that court, fond of the prerogative, and in want of money.

After the Revolution, the principles of commerce and government were better understood than in former times; the writings of Sir Francis Bacon, Sir William Petty, Sir William Temple, Sir Josiah Child, Algernon Sidney, and Dean Tucker, and other great men, contributed much to cure the nation of their old aversion to foreigners, especially the most useful part of them, merchants and mechanics (1). By modern statutes, therefore, many of the old regulations are modified, and many others are not acted upon, and the modern treaties generally regulate the intercourse of foreigners (2); but, as observed by one of those able writers, even in modern times, and in the senate

( ) Tucker, 49. (2) Ante, 42.

house, a person was found who had the decency to propose *to kick all the foreigners out of the nation;* upon which it has been observed, that this polite expression had of late been quoted with such applause by persons of the same stamp, and echoed through the kingdom in such a manner, as if he deserved to have a statue erected to his memory, for the service he had done his country. (1)

We will now concisely consider, in a due and practical order, the different legislative restraints which affect the freedom of trade of the subjects of a foreign state in this country, and the constructions upon them. These exceptions or limitations are of two descriptions; comprising, *first,* the regulations with respect to *residence,* liability to search, &c. which attach upon an alien merchant or artificer on his very establishment in the country, and independently of any actual exercise of his occupation; and, *secondly,* the regulations under which an alien merchant or artificer is placed in his *actual traffic* with his customers. We will *begin* by considering the first class of regulations, under which an alien merchant or artificer is placed on his very establishment in this country, and independently of any actual exercise of his occupation: and the clearest way of viewing these regulations will be to examine them, *first,* with relation to the alien traders *themselves;* and, *secondly,* with relation to the *alien apprentices, journeymen,* and *servants,* who may or may not be retained in the service of alien traders, or of the king's own subjects.

I. Regulations affecting first *establishment* of an alien in this country; and,

1st, as affect themselves.

First, then, as to the alien traders themselves: The act of 27 Edw. 3. stat. 2. called the Statute of the *Staple,* has several provisions relating to alien merchants. In the 2d chapter, it adopts them into the king's especial protection; and, in the 17th, it exempts their goods from being seized for debts of one another, where they are not sureties, saving the law of marque and reprisals. The same spirit of liberality is shown to merchant strangers by the stat. 14 Ric. 2. c. 9., which provides, "that merchant strangers, repairing into the realm of England, shall be well and courteously and rightfully used and governed in the said realm, to the intent that they shall have the greater courage to repair into the same." Then comes the

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(1) Tucker, 49, 50. (2) 27 Edw. 3. st. 2. c. 17.

stat. 5 Hen. 4. c. 7., by which it is enacted, "that all merchant strangers, of what estate or condition that they be, coming, dwelling, or repairing within the realm of England, shall be entreated or demeaned within the same realm in the manner, form and condition as the merchants denizens be, or shall be entreated or demeaned in the parts beyond the sea." The stat. 5 Hen. 4. c. 9. among other things enacts, "that in every city, town, and port of the sea in England, the customers and comptrollers of our lord the king in all the ports of England, shall take sufficient sureties for all manner of merchandizes brought by the merchants aliens and strangers coming and repairing to the said ports, to the intent that the money taken for the said merchandize shall be employed upon the commodities of the realm, saving their reasonable costs, as in the same statutes more fully is contained. And, moreover, it is ordained and established, that the said merchants aliens and strangers shall sell their said merchandizes so brought within the said realm within a quarter of a year next after their coming into the same; and also that the money which shall be delivered by exchange in England, be employed upon the commodities of the realm, within the said realm, upon pain of forfeiture of the same money; and that no merchant *alien* nor stranger shall sell any manner of merchandize to any other merchant alien or stranger, upon pain of forfeiture of the same merchandize: and also, it is ordained and established, that in every city, town, and port of the sea in England, where the said merchants aliens or strangers be, or shall be repairing, sufficient hosts shall be assigned to the same merchants, by the mayor, sheriffs, or bailiffs of the said cities, towns, or ports of the sea; and that the said merchants aliens and strangers shall dwell in no other place, but with their said hosts so to be assigned; and that the same hosts so to be assigned shall take for their travel in the manner as was accustomed in old time." The two last-mentioned acts are confirmed by that of 4 Hen. 5. c. 5.

The 17 Edw. 4. c. 1. provides, that aliens and strangers, workers in gold and silver, inhabiting in the city of London, shall inhabit in the open streets of the same city, where there is the best and most open publicity of their art. The 14 & 15 Hen. 8. c. 2. contains several regulations as to aliens; enacting, among other things, "that all aliens born, whether denizens or not, who inhabit in London, Westminster, Southwark, and the environs, shall be under the search and re-

formation of the wardens and fellowships of handicrafts within the city of London, with one substantial stranger; that the wardens, with such stranger as aforesaid, shall appoint a proper mark, by which the aliens' merchandizes may be known; and have full power to search and reform all manner of wares of workmanships made by such alien handicraftsmen; and that no alien using the occupation of smith, joiner, or cooper, shall make any wares without putting such mark to them before they are sold or used." A similar power of search and reformation is given to other officers in other towns; but the act does not extend to aliens dwelling in the universities of Oxford or Cambridge, or within the sanctuary of St. Martin's le Grand in London. If the officers in London or elsewhere refuse to mark the wares, the alien may sell them without mark; and as to the marking, it is declared that the act extends only to the trades of joiners, pouchmakers, coopers, and blacksmiths. By 21 Hen. 8. c. 16. the last-mentioned regulation was confirmed; and it was further provided, that alien artificers and others, being housekeepers, should pay the same charges as the king's subjects of the same trade, or on refusal, should no longer occupy any handicraft: that they should take certain oaths; that no stranger artificers or handicraftsmen, who were not householders at a time therein mentioned, should set up or keep any house, shop, or chamber, wherein they should exercise any handicraft or mystery; and that they should not assemble but in the common hall of their crafts; and that foreign artificers, being denizens and householders, and inhabiting and occupying any craft in or within two miles of London, should go with the wardens to make search, according to the last-mentioned statute of 14 & 15 Hen. 8. c. 2. The act confirms the exemptions enjoyed by the universities of Oxford and Cambridge, providing commission of certain persons to make search and view for particular purposes in St. Martin's le Grand.

The 13 & 14 Charles 2. c. 11. § 10. enacts, "that for preventing of frauds in colouring of strangers goods, and otherwise, every merchant or other passing any goods, wares, or merchandizes inwards or outwards, shall by himself or his known servant, factor, or agent, subscribe one of his bills of every entry with the mark, number, and contents of every parcel of such goods as are rated to pay by the piece or measure, and weight of the whole parcel of such goods as are rated to pay by the weight; without which the officers of the customs shall not

suffer any entry to pass; and that no children of aliens under the age of twenty-one years be permitted to be traders, or any goods or merchandizes to be entered in their names. (1)

The acts of the 33 Geo. 3. c. 4. contained some exceptions in favor of alien merchants, which however were repealed by the 38 Geo. 3. c. 50. The object of both these acts, as well as of some other modern statutes, was to impose regulations of police upon aliens. The last of these was the statute 56 Geo. 3. c. 86. § 1. (2) which enables his Majesty, by proclamation or order

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(1) Bac. Ab. Aliens, C.

(2) See the statute post, last volume. Much discussion arose whilst this act was passing, with respect to the right and propriety of excluding aliens, or abridging their right of continuing here unmolested. The king has an undoubted right by his prerogative to send aliens out of the kingdom, if at any time he should think fit. Those who have denied this right have argued, that by the 48th article of Magna Charta, and statute the 27th of Edward the third, foreigners are as much protected as natural-born subjects. It has also been urged, that one solitary and doubtful precedent only has been produced when this power was exercised in the early part of our history, that unless there has been a long, avowed, and uncontested exercise of it, sanctioned by parliament, or at least recognized by the courts of Westminster, it does not exist, and that such a restriction would be an act of cruelty and persecution to foreigners. The prerogative has been supported on the other side by the following arguments. The 48th article of Magna Charta, and statute the 27th of Edward the third, were intended solely for the protection of foreign *merchants,* and not to extend to aliens in general. There are numerous instances on the Rolls of Parliament in which the Commons have petitioned the crown to have aliens sent out of the kingdom. It has never been used except to protect the state against the machinations of foreigners. The plans of the French revolutionists in 1793, and the danger of Bonaparte's partizans spreading his principles in this country in 1814, made it necessary that the crown should have this power of expelling aliens. The unfortunate natives of other countries have always been hospitably received, and strangers well conducting themselves have never been molested. The power of expelling aliens is vested in the supreme authority of the state, because its execution frequently demands the utmost promptitude, and is therefore, by strict analogy to other powers, placed in the hands of the crown. The power of the monarch over foreign relations proves he has this right. The power the king has of making war on whole nations, includes the power over individuals, as the greater includes the less. It is inseparable from the governing power in any country to be able to take precautions against foreigners residing in such country, and particularly in a country where foreigners are only amenable to the ordinary laws. This strong and forcible reasoning on behalf of the prerogative of the crown unquestionably proves its existence. The following passage in Holinshed's Chronicles will show

in council, to direct that any alien shall depart this realm; and in case of refusal he may be arrested and carried abroad or imprisoned; and masters of ships are required, immediately on their arrival here, to report the aliens on board, except mariners of the ship, to an inspector or collector of customs, under penalty of £10 for each alien omitted; and every alien, immediately on his arrival here, is to make a full report of himself, and his designation, to the same officer, under penalty of imprisonment, or liability on conviction to be sent abroad; and the particulars are to be registered by the officer, who is to give the alien a counterpart, who is, within a week after his arrival, to produce the same in London, at the Aliens' Office in Crown Street, Westminster, or to the chief magistrate of any other place where he may be. Then follow subordinate regulations, and a clause protecting aliens who quitted France on account of the troubles there, from liability to be arrested for any debt contracted out of this kingdom.

2dly, Regulations as to aliens, apprentices, journeymen, and servants.

We will next consider the distinctions between aliens and natural-born subjects which prevail in the law of *apprentices, journeymen, and servants.* The statute 1 Ric. 3. c. 9. § 11. enacts, that no person not born under the king's obeisance, inhabiting, dwelling, or holding any great house or chamber in

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it was exercised at a very early period. Speaking of the foreigners banished in the second year of the reign of Henry the second, he says: "Moreover by the sentence and doom of his councellers, to the intent that peace and quiet order might take place and be the better maintained, he commanded, by way of publishing a proclamation, that all strangers (which to get somewhat by the wars had flocked into the realme during the time of the civil discord between him and the king Stephen) should depart home without further delay: wherefore he appointed them a day before which they should avoid, upon peril what might ensue. It was a world's wonder to see and mark how suddenlie these aliens were quite vanished, as though they had been phantasmes."—It is only necessary to transcribe the 48th article of Magna Charta, and the part alluded to of the statute of the 27th of Edward the third, to show that they relate to foreign *merchants* only. "Omnes mercatores habeant salvum et securum exire de Anglia et venire in Angliam et morari et ire per Angliam tam per terram quam per aquam ad emendum et vendendum sine omnibus malis toltis per antiquas et rectas consuetudines preterquam in tempore guerre et si sint de terra contra nos guerrina." Sir Edward Coke appears to have understood it precisely in this manner. He says, commenting on the 33d article of Magna Charta of Henry the third, "Omnes mercatores," this chapter concerneth *merchant* strangers. The power, however, of sending aliens out of the country has been wisely delegated of late years to the legislature.

this realm, and occupying any handicraft, or being artificer, or handicraftsman, shall take any apprentice, servant, or any other person to work with him or to his use, unless it be his son or his daughter, other than at the feast therein mentioned, shall be apprentices or servants with him, except that the same apprentices or servants so to be taken be the king's subjects born. The 14 & 15 Hen. 8. c. 2. enacts to the same effect, and provides that no alien handicraftsman shall keep more than two alien journeymen or covenant servants; but that it should be lawful to any lord of the parliament, and every other of the king's subjects, having lands and tenements to the yearly value of one hundred pounds, to take and retain estrangers joiners and glaziers in their service from time to time, to and for the exercising with them their crafts, this act notwithstanding. This regulation however does not extend to aliens inhabitants of Oxford, Cambridge, or the sanctuary of Saint Martin's le Grand. The 21 Hen. 8. c. 16. enacts that no stranger artificer shall keep more than two alien servants; and after confirming the statute last mentioned, it proceeds to enact that the inhabitants of Oxford, Cambridge, or the sanctuary of Saint Martin's le Grand, may keep ten journeymen or apprentices: this privilege of these places however was taken away by the 32 Hen. 8. c. 16. which restricts the inhabitants of them to two alien apprentices, journeymen, or servants: and by the statute 25 Hen. 8. c. 9. § 3. pewterers are forbidden to take any alien apprentice or journeyman at all.

II. Regulations as to alien merchants traffic with others.

We will now proceed to the *second* great class of regulations; those under which an alien merchant or artificer is placed *in his actual traffic* with his customers. This class subdivides itself into five heads: as it relates *first* to the description of persons with whom an alien merchant or artificer may trade; *secondly*, to the *period* within which his commercial transactions must be negociated; *thirdly*, to the places where he is permitted to exercise his occupation; *fourthly*, to the description of goods or employment about which he is permitted to occupy himself for the purposes of foreign or domestic commerce, and whether by retail or by wholesale only; and, *fifthly*, to the extra duties which are imposed upon him.

And, first, as to *the description of persons with whom alien merchants may traffic.* Under the act of 9 Edw. 3. st. 1. c. 1. they were authorised in selling their goods to what persons it

should please them, as well to foreigners as denizens, except the king's enemies; and the same permission was confirmed by the acts of the 25 Edw. 3. st. 4. c. 2. the 2 Rich. 2. st. 1. c. 1. and the 11 Rich. 2. c. 7.: *but* this freedom was at length restricted by the 16 Rich. 2. c. 1. which enacts that no strange merchant alien shall sell nor buy nor merchandize within the realm with another strange merchant alien to sell again: this act extends only to sales for the purpose of selling again; but the statute 5 Hen. 4. c. 9. carried the same principle still further, by ordaining that no merchant alien nor stranger should sell any manner of merchandize to any *other alien* or stranger merchant, upon pain of forfeiture of the same merchandize. Even the most indirect communication between alien merchants has been strongly discouraged; for the 6 Hen. 4. c. 4. provides that merchants alien and strangers shall not carry or cause to be carried out of the realm, any merchandizes bought within the realm by the merchants aliens and strangers aforesaid.

Secondly, as to the *period or time within which the commercial transactions of an alien merchant must be negociated*. The stat. 5 Hen. 4. c. 9. enacts, that merchants aliens shall sell their merchandizes brought within the realm within a quarter of a year next after their coming into the same; but this ordinance was repealed by 6 Hen. 4. c. 4. The stat. of 8 Hen. 6. c. 24. provides, that no Englishman shall sell merchandizes to any alien but only for ready payment in hand, or else in merchandizes for merchandizes, to be paid and held in hand. But this was altered by 9 Hen. 6. c. 2., which permitted English merchants to sell their merchandizes to aliens, giving *six months credit*.

Thirdly, we are to inquire *in what places* an alien merchant is permitted to exercise his *occupation*. And here the principal impediment which aliens have experienced, has been thrown in their way by the franchises of particular towns. We will take a short historical view of the statutes on this subject. The 11 Edw. 3. c. 5., so far from encouraging these franchises to the detriment of aliens, invited foreign cloth-workers into the kingdom, with a promise of franchises to themselves. But the act of 14 Edw. 3. st. 2. c. 3. was not so indulgent; after reciting the before-mentioned provisions of Magna Charta, it declares that all merchants, denizens and foreigners, except those which be of the king's enmity, may without let safely come into the said

realm of England with their goods and merchandizes, and safely tarry and safely return, paying the customs, subsidies, and other profits reasonably thereof due; so always that franchises and free customs reasonably granted by us and our ancestors to the city of London, and other cities, boroughs, and good towns of our realm of England, be to them saved. The act of 18 Edw. 3. st. 2. c. 3. enacted, that the sea should be open to all manner of merchants to pass with their merchandizes, where it should please them: and the act of 25 Edw. 3. st. 4. c. 2. established the same facilities on the land, by restoring the freedom of trade in spite of the franchises of particular places. By the statute of 28 Edw. 3. c. 13. it was enacted, that no ship shall be compelled to come to or stay in England; and that if ships come of their own will or by misfortune, and those on board be desirous of selling their merchandize, it may be bought, though it be not landed, so there be no forestalling; that the masters, mariners, and merchants, having sold what they please and paid the customs, may depart with their ships and the remnant of their goods without custom; and that none shall distress them by driving them to any particular port, or meddling with their sale after they have arrived. This act is confirmed by 20 Rich. 2. c. 4. The 38 Edw. 3. st. 1. c. 2. declares that all merchants, as well aliens as denizens, may sell and buy all manner of merchandize, and freely carry them out of the realm, paying the customs and subsidies thereof due; except that the English merchants shall not pass out of the realm. The freedom of trade, which had been restored to alien merchants by the before-mentioned statute of 25 Edw. 3., notwithstanding the franchises of particular places, was confirmed by the act of 2 Rich. 2. st. 1. c. 1., saving to the prelates and lords of the realm their rights of purveyance of victuals; which was a privilege (now no longer in existence) of buying up provisions at an appraised value in preference to all other persons, and even without the consent of the owner (1). The 5 Rich. 2. st. 2. c. 1. enacts, that merchants strangers shall be welcome, as well within franchises as without, to merchandize and tarry as long as them list. The 11 Rich. 2. c. 7. confirms the before-mentioned statutes of 9 Edw. 3. st. 1. c. 1. and 25 Edw. 3. st. 4. c. 2., by which the freedom of trade is insured to alien merchants in spite of particular franchises. Some restrictions, which we have noticed in other parts of this chapter, were

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(1) 1 Bla. Com. 287, S. ante, 103.

imposed by the stat. 16 Rich. 2. c. 1.; but in the main the freedom of trade was confirmed, notwithstanding the franchises of the towns. The last statute that refers to the place where the trade of an alien in Great Britain must be carried on, is 1 Rich. 3. c. 9. s. 11., which enacts, that all persons not born under the king's obeisance, being artificers or handicraftmen dwelling in this realm, who shall use, exercise, or occupy the feat of merchandize of any manner of wares within this realm, shall deal, sell, or barter the same in the port, town, or place where the same artificers be or shall be dwelling, and in no other place, upon pain of forfeiture. of all the value of all the goods sold contrary to the act. The navigation act, 12 Car. 2. c. 18. s. 2. enacts, that aliens shall not exercise the occupation of merchants or factors in the plantations, upon pain of forfeiture of all his goods, or which are in his possession; one-third to the king, one to the governor of the place, and the other third to the informer (1).

Fourthly, we are to inquire *in what description of goods or employment an alien merchant may deal or occupy himself*.—And here we will examine, *first*, what are the *kinds of goods* in which an alien merchant is prohibited from dealing within the realm; whether such prohibition be absolute, or subject to relaxations on certain conditions. *Secondly*, what are the kinds of goods which he is prohibited from *exporting* out of England; whether such prohibition be absolute, or subject to relaxations on certain conditions. *Thirdly*, what are the kinds of goods in which certain statutes have required him to invest the whole or any part of his capital; and *fourthly*, what are the kinds of goods which may not be sold indiscriminately by wholesale or retail.

And, 1st, of those kinds of goods, in which an alien merchant is prohibited from dealing freely *within* the realm. By the 38 Edw. 3. st. 1. c. 2. it was enacted that all merchants, as well aliens as denizens, might sell and buy all manner of merchandize. The 27 Edw. 3., called the statute of the staple, even gives to alien merchants the privilege of exporting wool, which it denies to natural-born subjects. The 6 Rich. 2. st. 1. c. 10. ex-

(1) The 34 Geo. 3. c. 42. s. 6. and 37 Geo. 3. c. 63. s. 5. contain provisions in favor of aliens residing in any place surrendered to His Majesty, and who shall take the oath of allegiance according to the terms of capitulation. See observation, Reeves, 2d ed. 301. n. a.; and see the enactments, post, 152.

pressly permits aliens in amity with the king to bring in victuals and sell them; this act is confirmed by 1 Hen. 4. c. 17., and 14 Hen. 6. c. 6.; but many following statutes contracted the liberty of foreign merchants to deal in all manner of merchandizes. That of 4 Edw. 4. c. 8. enacts, that no manner of stranger nor alien, by himself or by any other, shall buy any English horns, unwrought, of any tanners, butchers, or of any other persons, gathered or growing, within the city of London and twenty-four miles on every side thereof; and that no Englishman, nor other persons, sell any English horns unwrought to any stranger, or cause them to be sent over the sea, so that the said horners will buy the said horns at like price as they be at the time of the making of this act, upon pain of forfeiture of all such horns so bought, sold, or sent. This was enacted for the benefit of English dealers in horns, or horners; and there is a provision, "that after that men of the said occupation within this land have taken out and chosen such and as many horns as shall be needful to their occupations, that then it shall be lawful to them, all and every of them, and other persons of this realm of England, to sell and deliver all the horns refused, which be not able to be occupied in their mystery, to any stranger or other person, to send or carry beyond the sea, or elsewhere, as shall please them." This statute was generally repealed by the 1 Jas. 1. c. 25. s. 44., but the particular enactments which we have quoted from it were revived, with some others, in the 7 Jas. 1. c. 14. The 1 Rich. 3. c. 9. enacts, that no person not born under the king's obeisance shall exercise or occupy any handicraft, or the occupation of any handicraftsmen in this realm of England, but depart into their own country again, or else be servants to such of the king's subjects only as be expert and cunning in such feats, arts, and crafts which the said strangers can occupy; also, that no person not born under the king's obeisance not made denizen, being artificer or handicraftsmen, nor yet any other for him or to his use, drape or make any cloth, or put any wool to work to make cloth of, within the said realm of England. There is a clause expressly permitting aliens to import and trade in books, but this provision is repealed by the 25 Hen. 8. c. 15. Next comes the 1 Rich. 3. c. 12., which enacts, "that no merchant stranger, after the feast of Easter next coming, shall bring into this realm of England, to be sold, any manner of girdles, nor horneys wrought for girdles, points, laces, leather purses, pouches, pins, gloves, knives, hangers, tailors' shears, sysors, andyrons, cobbards, tongs, fireforks,

gredyrons, stocklocks, keys, hinges and garnets, spurrs, painted glasses, painted papers, painted forcers, painted images, painted cloths, beaten gold or beaten silver wrought in papers for painters, saddles, saddle-trees, horse harness, boots, bits, stirrups, buckles, chains, lattin nails with iron shanks, turnets, standing candlesticks, hanging candlesticks, holy-water stops, chaffing dishes, hanging lavers, curtain rings, cards for wool (except Roan cards), clasps for gowns, buckles for shoes, broches, bells (except hawk's bells), tin and leaden spoons, wyre of latten and iron, iron candlesticks, grates, horns for lanthorns, or any of the said wares made and wrought pertaining to the crafts therein specified, or any of them." By the 25 Hen. 8. c. 9. it is enacted, that no stranger born out of this realm shall occupy, exercise, or use the craft of pewterers, nor work any manner of vessel or other ware to be made of tin or pewter, within any place or places of this realm, and that no pewterer shall take any stranger born out of this realm to be his apprentice or journeyman. Mr. Justice Blackstone, alluding to some of these acts, has said (1), "There are some obsolete statutes of Hen. 8. prohibiting alien artificers to work for themselves in this kingdom, but it is generally held that they were *virtually* repealed by stat. 5 Eliz. c. 7.;" but it has been observed that there is no authority to that effect (2). By the 15 Car. 2. c. 15. aliens are expressly encouraged to carry on the trades of breaking, hickling, and dressing of hemp or flax, making and whitening of thread, spinning, weaving, making, whitening, or bleaching of any sort of cloth made of hemp or flax only, making of twine or nets for fishing, or of stowing of cordage, or of making any sort of tapestry hangings; and the 33 Geo. 3. c. 4. s. 6. acknowledges the right of aliens to deal in weapons, arms, gunpowder, and ammunition.

2dly. There are certain *kinds of occupations*, the exercise of which by aliens is confined to this *country* alone, either *absolutely*, or with certain *conditional exceptions:* these form the next branch of our inquiry. The 9 Edw. 3. stat. 1. c. 1. prohibited merchants alien from carrying wine out of the realm. The great statute of the staple, 27 Edw. 3. stat. 2. c. 1. contains, in the first chapter, a requisition that alien merchants shall be sworn to hold no staple beyond sea, of wool, woolfels, hides, and lead;

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(1) 1 Bla. Com. 372.

(2) 1 Woodeson, 373. Bac. Ab. Aliens, C. Co. Lit. 2. n. 7.

but the same chapter gives them the privilege of *exporting* wool, which it denies to a natural-born subject. And the 38 Edw. 3. stat. 1. c. 2. declared, that all merchants, as well aliens as denizens, might sell and buy all manner of merchandizes, and freely carry them out of the realm, paying the customs and subsidies thereof due, except that the English merchants should not pass out of the realm with wool or woolfels, and that none should carry gold or silver out of the realm, unless as therein particularized. The 27 Hen. 8. c. 14. s. 4. enacts, that if any stranger or other factor, at any time hereafter, do convey and carry any leather from one port to another, to the intent to ship the same in such other port whereunto it shall be so conveyed, the same stranger, or other his factor for him, before such transporting of the same leather, shall cause the same leather first to be tolled within the same port from whence he will or intendeth to carry the same; and the same so tolled cause to be entered by the customer of the same port or his deputy, and cause to be also packed by the said packer of the said port where it shall be so tolled, taking of the customer or customers of the same port or haven, or of their deputy or deputies, a certificate, expressing the number or quantity of dickers of all the same leather so to be carried and transported, directed to the customer of the other port or haven whereunto the same leather shall be so conveyed, making mention in the same certificate, whether the custom thereof accordingly be truly paid or not. It was provided by 33 Hen. 8. c. 9. s. 9., that no stranger, born out of the king's obeisance, not being denizen, shall convey or cause to be conveyed, give, sell, or exchange, into any parts out of the king's obeisance, any long bows, arrows, or shafts, without the king's special licence. The 35 Eliz. c. 11. s. 2., which is entitled an act for the bringing in of clap-board from the parts beyond the seas, and the restraining of the transporting of wine casks, and for the saving and preserving of timber within the realm, enacts, in the second section, that every person who shall ship, carry, or transport any beer into parts beyond the seas, to be sold or exchanged for other merchandize, shall if he be a stranger before the same transporting, or if he be a subject born, either before the same transporting or within four months after, bring or cause to be brought into this realm, from the parts beyond the seas, for every six tons of beer, two hundred of clap-board fit for to make cask of, to contain in length three foot and two inches at the least, or else the same cask again, or so much other good and sweet cask in quantity,

and the same to be entered at the custom-house without any colouring; or if the same transporting shall be into the realm of Ireland, then to bring in, in manner and form as aforesaid, so much of the shaffold-board in quantity as the clap-board amounteth unto. And in the third section it enacts, that no stranger born shall carry or transport beyond the seas any pilchers or other fish in cask, unless the same person have before such shipping, brought or cause to be brought into this realm from the parts beyond the seas, for every six tons of pilchers or other fish, according to the rate and manner aforesaid of clap-board fit for cask, or else of cask, as aforesaid.

Though aliens are allowed the exercise of trade in Great Britain, yet by 12 Car. 2. c. 18. s. 2. it is enacted, that no alien, unless naturalized or made a denizen, shall exercise the trade of a merchant or factor in the *English plantations* in Asia, Africa, or America, on pain of forfeiting all his goods, &c. But this disability was removed as to the West Indies by 34 Geo. 3. c. 42. and as to other places by the 37 Geo. 3. c. 63. s. 5., which enact that every person, though an alien born, and neither naturalized nor made a free denizen, who shall reside in any island or place which has surrendered or which shall hereafter surrender to his Majesty and be in his Majesty's possession, and who shall have taken the oath of fidelity and allegiance to his Majesty, according to the terms of the capitulation under which such island or place shall have surrendered, shall be, and shall, from the time of such surrender, be deemed to have been entitled to exercise the trade or occupation of a merchant or factor in any such island or place, whilst under the king's protection; subject nevertheless to such laws and regulations as his Majesty's subjects shall and may be liable to in the same islands or places. To this clause is added another, saving the rights of the East India Company. We will consider the prohibitions on the subject of *fishing* in a following chapter, where we are to examine the effect of the navigation acts on foreigners; and the prohibitions upon the exportation of *bullion* by aliens will fall under the succeeding head of this great class of regulations, more conveniently than under the present.

3dly. In the next place, then, we will shortly inquire *what are* the *kinds of goods* in which certain statutes have required an alien merchant to invest the whole or any *part of his capital*. The 14 Rich 2. c. 1. enacted, that every person alien, of what degree or condition that he be, that bringeth any mer-

chandize into England, shall find sufficient sureties before the customers, in the port where the merchandize shall be brought, to buy other merchandize to the value of *half* the said merchandizes so brought at the least, as wool, leather, woolfels, lead, tin, butter, cheese, cloths, or other commodities of the land. This regulation applied only to *sales*; and it will be observed that the quantity of British goods to be bought amounts to only *half* the value of the foreign goods imported. But in the regulation which applies to the *exchanges* negotiated by foreigners, and which will be found in the 14 Rich. 2. c. 2. the injunction to take British goods extended to the *whole* value of the exchange. Nor did it content itself with this direction: it further enacted, that the goods to be purchased should not only be British goods, but merchandizes of the staple; and that the purchase shall be made within three months after the exchange. The 2 Hen. 4. c. 5. after forbidding the exportation of gold and silver to all manner of people, concluded with a proviso, "That the merchants strangers that do sell their merchandize within the realm of England, and the one half of the money of England received for the same merchandizes do employ upon other merchandizes of the realm, may freely carry out from the same the other half of the said money by the king's licence, according to the statute thereof made." But it was not long before the compulsion to invest the *whole* of the capital in English goods was extended from money received by *exchange* to the proceeds of *sales*: for the 4 Hen. 4. c. 15. enacted, that all the merchants, strangers, and denizens, which bring merchandizes into this realm of England, and the same do sell within the realm, and receive English money for the same, that they shall bestow the same upon other merchandizes of England, for to carry the same out of the realm of England, without carrying any gold or silver in coin, plate, or mass, out of the same realm, upon pain of forfeiture of the same, saving always their reasonable costs. A considerable number of succeeding statutes, some of them perpetual, and some only temporary, confirmed and enforced the provision of this act. Those which were intended to be *permanent* are the following; First, the 5 Hen. 4. c. 9. (1) which enacted, that for the better keeping of *gold and silver* within the realm of England (2), and

(1) The 4 Hen. 7. c. 23. directs, that gold and silver shall not be paid to foreigners.

(2) Exportation of British gold and silver coin is prohibited by 9 Edw 3. st. 2. c. 1. 38 Edw. 3. st. 1. c. 2. 5 Rich. 2. st. 1. c. 2. 2 Hen 6. c. 6. 17 Edw. 4. c. 1. 4 Hen. 7. c. 23. 3 Hen. 8. c. 1. under penalty of forfeiture; and there have been several recent instances of seizures.

for the increase of the commodities of the said realm, the customers and comptrollers of our lord the king in all the ports of England, shall take sufficient *sureties* for all manner of merchandizes brought by the merchants aliens and strangers coming and repairing to the said ports, to the intent that the money taken for the said merchandize shall be employed upon the commodities of the realm, saving their reasonable costs, as in the same statute more fully is contained. And moreover it is ordained and established, that the money which shall be delivered by exchange in England be employed upon the commodities of the realm, within the same realm, upon pain of forfeiture of the same money. The legislature having in view, as we have aeen in the preamble to the last-recited statute, a twofold object, as well the increase of British commodities as the detention of gold and silver within the realm, it was strictly insisted upon in former times, not only that alien merchants should carry their whole cargo in goods, but that those goods should be exclusively British. Thus the 6 Hen. 4. c. 4. enacted, that merchants aliens and strangers should not carry or cause to be carried out of the realm any merchandizes brought within the realm by the merchants aliens and strangers aforesaid. It was enacted by the 2 Hen. 6. c. 6. that the merchants *aliens* shall find surety in the chancery, every company for those of its company, that none of them shall carry out of the realm any *gold or silver* against the form of the stat. of Hen. 5. c. 6., of which the object had been the establishment of the mint at Calais. The investment of the entire capital in *British merchandize* is strongly enforced by the 17 Edw. 4. c. 1., which, after reciting the before-mentioned stat. of 5 Hen. 4. c. 9., and complaining, that, contrary to that ordinance, even the merchants and divers other persons take and carry from day to day the money of this realm by them received, out of the same realm, to the great diminution of the same money, and in fact do not employ it on the commodities of this realm, whereby the customs and subsidies of the king are greatly decayed, enacts, that therefore every merchant alien and every other victualler and other stranger not being denizen, that resort to any place or port within this realm, or Wales, after the feast of Easter then next following, should duly employ all the money by him to be received within any port within this realm or Wales, upon the merchandizes or other commodities of this realm, or else without fraud put the same money in due payment to the liege subjects of the king within this realm; the same employment or payment duly to be proved by the merchant alien, victualler, or other

stranger, before his departing out of the same port, by writing from the merchant or merchants to whom the said merchant alien, victualler, or other stranger hath employed or paid his money by him received for his merchandizes brought into this land, witnessing that he hath so done, or else by such proofs as shall be thought reasonable, to the customer or comptroller of the same port, and to the mayor, bailiff, or other chief governors of such city, borough, or town where any such port shall be, upon pain of forfeiture of all his goods, being within this realm and to have imprisonment of a year; saving always to every such merchant, victualler, and other strangers, his reasonable costs. Provided always, that this act do not extend to any ambassador or other stranger come or to come into this realm, or to go out of the same by the *licence of the king*, as for any money of gold and silver plate, vessel or jewel, or any ornament of silver or gold belonging to his person, brought by him into this realm, or to any ambassador of the king, herald, pursuivant, or messenger, who shall pass out of this realm over by the sea by license of the king, or to any merchant going over the sea to buy any wine to bring into this realm, as to carrying with him merely a little cup called a *taster*, or shewer for wine. This act was to continue from Easter then next following for seven years. To this stat. succeeded that of the 3 Hen. 7. c. 8. by which, after a recital that the last-mentioned act was made to endure only for seven years, so that gold and silver received by merchants aliens, and other victuallers and strangers not being denizens, for merchandize brought into this land, is not employed upon the commodities of this land, but conveyed and carried out of this realm, to the great loss of the king in his custom and subsidy, and the impoverishing of this realm; it was enacted, that the said act made in the said seventeenth year of the reign of king Edward the fourth, with all things comprized in the, same touching the premises, and every provision made in the same, be good, effectual, and endure for ever. And it was ordained by the said authority, that every customer or comptroller shall take sufficient surety of every of the said merchants, victualler, or other stranger, to employ the value of the said merchandizes, or to put the same money for the said merchandizes received in due payment, his reasonable expences always deducted, upon pain of forfeiture of the value of the said merchandizes, the one half of the said forfeiture to the king, the other half to the party that will sue for the same." (1)

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(1) See also proclamations of Hen. 8. 2 And. Hist. Com. 54, 5.

All those statutes were founded on the *mistaken and now exploded doctrine* of that school of political economists who were denominated the *mercantile sect.* It was the basis of their theory, that the riches of a nation consisted in her accumulation of gold and silver. But money, or gold and silver, as Dr. Adam Smith has irrefragably proved (1), is not the sole wealth of a nation: it constitutes, indeed, a *part* of the national capital; but generally a *small* part. For a state may subsist, and flourish in riches and splendour, without gold or silver even sufficient to circulate its own internal commerce; which is the case of Great Britain at the present day. Nay more: the very wars of a nation, though they must be maintained by foreign expenditure, do not necessarily require a store of gold and silver to support them. Fleets and armies, says Dr. Smith (2), are maintained not with gold and silver, but with consumable goods. The nation which, from the annual produce of its domestic industry, from the annual revenue arising out of its lands and labour and consumable stock, has wherewithal to purchase those consumable goods in distant countries, can maintain foreign wars there. There is in all great commercial countries a good deal of bullion alternately imported and exported for the purposes of foreign trade. This bullion, as it circulates among different commercial countries in the same manner as the national coin circulates in every particular country, may be considered as the money of the great mercantile republic. The national coin receives its movement and direction from the *commodities* circulated within the precincts of each particular country; the money of the mercantile republic from those circulated between different countries. Both are employed in facilitating exchanges; the one between different individuals of the *same*, the other between those of *different* nations. Part of this money of the great mercantile republic may have been, and probably was, employed in carrying on the then late war. In time of a general war, it is natural to suppose that a movement and direction should be impressed upon it, different from what it usually follows in profound peace: that it should circulate more about the seat of the war, and be more employed in purchasing there, and in the neighbouring countries, the pay and provisions of the different armies. But whatever part of this money of the mercantile republic Great Britain may have annually employed in this manner, it must have been annually purchased, either with British commo-

(1) 2 Smith's W. N. b. 4. c. 1. p. 187.

(2) 2 Smith, b. 4. c. 1. pp. 190 191.

dities, or with something else that had been purchased with them; which still bring us back to *commodities*, to the annual produce of the land and labour of the country, as the ultimate resources which enabled us to carry on the war. It is natural, indeed, to suppose, that so great an annual expence must have been defrayed from a great annual produce. The expence of 1761, for example, amounted to more than 19 millions. No accumulation could have supported so great an annual profusion. There is no annual produce, even of gold and silver, which could have supported it. The whole gold and silver annually imported into both Spain and Portugal, according to the best accounts, does not commonly much exceed six millions sterling, which, in some years, would scarce have paid four months expence of the late war.

The commodities most proper for being transported to distant countries in order to purchase there, either the pay and provisions of an army, or some part of the money of the mercantile republic to be employed in purchasing them, seem to be the finer *and more improved manufactures*, such as contain a great value in a small bulk, and can therefore be exported to a great distance at little expence. A country whose industry produces a great annual surplus of such manufactures, which are usually exported to foreign countries, may carry on for many years a very expensive foreign war, without either exporting any considerable quantity of gold and silver, or even having any such quantity to export. But even if it had been true that money is the sole wealth of a nation, and a hoard of gold and silver the only security against foreign attack; the aim of these statutes would still have been ineffectual, for they do not in point of fact, nor is it possible that any statutes should effect that accumulation of precious metals which they seek. As soon as a country has acquired as much gold and silver as are sufficient to supply her own circulation at par with other countries, every additional guinea imported is absolutely useless, except for the purpose of re-exportation: the re-exportation of the precious metals becomes therefore more profitable than their detention at home; and when the difference of profit becomes at all considerable, or, in Dr. Smith's words, when the quantity of gold and silver imported into any country exceeds the effectual demand, no vigilance of government can prevent their exportation. All the sanguinary laws of Spain and Portugal, continues he (1), are not

(1) 2 Smith, b. 4. c. 1. p. 181.

able to keep their gold and silver at home: the continual importations from Peru and Brazil exceed the effectual demand of those countries, and sink the price of those metals there below that in the neighbouring countries. If, on the contrary, in any particular country their quantity fell short of the effectual demand, so as to raise their price above that of the neighbouring countries, the government would have no occasion to take any pains to import them: if it were even to take pains to prevent their importation, it would not be able to effectuate it. Those metals, when the Spartans had got wherewithal to purchase them, broke through all the barriers which the laws of Lycurgus opposed to their entrance into Lacedemon. All the penal laws of the customs are not able to prevent the importation of the teas of the Dutch and Gottenburgh East India Companies; because somewhat cheaper than those of the British company. A pound of tea however is about a hundred times the bulk of one of the highest prices, sixteen shillings, that is commonly paid for it in silver, and more than two thousand times the bulk of the same price in gold, and consequently just so many times more difficult to smuggle. No commodities (1) regulate themselves more easily or more exactly according to this effectual demand, than gold and silver; because, on account of the small bulk and great value of those metals, no commodities can be more easily transported from one place to another, from the places where they are dear, from the places where they exceed, to those where they fall short of this effectual demand; if there were in England, for example, an effectual demand for an additional quantity of gold, a packet-boat could bring from Lisbon, or from wherever else it was to be had, fifty tons of gold, which could be coined into more than five millions of guineas.

Such considerations as these, with others, less solid indeed, but calculated to accord with the prejudices of the nation, produced at last the 15 Cha. 2. c. 7. s. 12., by which it was enacted, that it should be lawful for any person or persons whatsoever to export out of any port of England or Wales, in which there is a customer or collector, or out of the town of Berwick, all sorts of *foreign coin* or *bullion* of gold or silver, first making entry thereof in such custom-house respectively, without paying any duty, custom, poundage, or fee for the same; any law, statute, or usage to the contrary notwithstanding. But

(1) 2 Smith, 180.

still the exportation of *British* gold or silver coin is illegal; so that aliens are still compelled to invest their capital exclusively in *British commodities*, or foreign coin or bullion, or to receive payment by bills on a foreign country.

4thly. With respect to the kinds of goods which aliens may *not sell by retail* or wholesale, the statute 2 Ric. 2. c. 1. imposed a prohibition upon certain *retail sales*, but which was removed by the 11 Ric. 2. c. 7. The prohibition of *retail sale* had never extended to fish or victuals of any kind, furs, spices, or any description of small wares, such as silk, coverchiefs, or gold and silver wire; yet the retail sale of fish seems to have been, in point of fact, interrupted by some authority, legal or illegal; so that it was thought necessary in the 6 Ric. 2. c. 10. expressly to declare that aliens might sell all victuals either wholesale or retail (1). This act is not printed at length in the statute book; but its provisions are to be found in the preamble to the statute 1 Hen. 4. c. 17. However this permission interfered with the franchises of the London citizens, and they contrived to obtain its repeal by the 7 Ric. 2. c. 11. The statute 16 Ric. 2. c. 1. enforced the restriction still more explicitly: for after reciting the liberal indulgences which aliens had received from the before-mentioned statutes of the 9 Edw. 3. st. 1. c. 18. and the 25 Edw. 3. st. 4. c. 2. it thus proceeds: Nevertheless, because it seems to our lord the king that the aforesaid statutes, if they be fully kept and executed, will extend to the great injury and damage, as well of the city of London, as of other cities, boroughs, and towns of the kingdom, it is ordained and agreed, that no stranger, or alien merchant, shall sell by retail within the realm, or cut up for sale, any manner of goods or merchandizes, except eatables and victuals. And that all aliens shall also sell *wines* by whole vessels, and spices by whole vessels, and bales, and not in any other manner; and that no manner of spicery, after it be brought into the realm, be carried out of the same realm by an alien, or by a denizen, on pain of forfeiture thereof.

The triumph of the citizens was not of long duration: for in the very first year of the succeeding reign of Henry IV. (2), the permission of *retail trade in victuals* was restored to alien merchants; and the allowance was further confirmed in the fourteenth

(1) Com. Dig. Trade, A. 4. (2) 1 Hen. 4. c. 17.

year of the same reign (1). The statute of 1 Ric. 3. c. 9. s. 11. enacts, that all persons not born under the king's obeisance, being artificers or handicraftmen dwelling in this realm, which shall use, exercise, or occupy the feat of merchandize of any manner of wares within this realm, shall sell or barter the same wares or merchandizes in *gross* and not *by retail*. And the 25 Hen. 8. c. 15. s. 3. enacts, that no person, inhabitant or *resiant* within this realm after the said feast of Christmas, shall buy within this realm of any stranger born out of the king's obedience, other than of denizens, any manner of printed books brought from any the parts beyond sea, except only by engross and not by retail.

Duties and customs payable by an alien or denizen.

5th. The last head of that great class of regulations under which an alien merchant is placed on his actual traffic, is that of *duties or customs*, of which we have shortly spoken before (2). It appears by the several acts of subsidies of tonnage and poundage, and also by the Carta Mercatoria, that aliens were chargeable with greater customs and subsidies than denizens were; and hence great distinctions between denizens and aliens in respect of customs, and the anxiety to obtain acts of naturalization (3). The statute 1 Hen. 7. c. 2. enacted, that any person made denizen should pay like customs and subsidies as he should have paid before; and a similar provision is found in 11 Hen. 7. c. 14. and 22 Hen 8. c. 8. (4) By the act 25 Car. 2. c. 6. a wise regulation was made for the encouragement of the exportation of our own product and manufactures; viz. for taking off aliens duty upon all the native commodities (coals excepted) and manufactures of England exported by foreigners, thereby putting them on a level with English subjects; whereas by 11 Hen. 7. c. 14., and the tonnage and poundage act, they were to pay double duties. By the same statute, aliens were to pay only the same duty for fish caught by Englishmen, and exported in English shipping, navigated as the navigation act directs, as the natives paid (5). The charge, generally called the alien's duty, continued until the 24 Geo. 3. sess. 2. c. 16. (6), which, after reciting "that the several duties and restrictions imposed by various acts of parliament upon merchandize, are, by the al-

(1) 14 Hen. 4. c. 6.

(2) Ante, 117, n. 2.

(3) Harg. Law Tracts, 209. 1 Bla. Com. 316.

(4) Id. Ibid. 2 Anders. Hist. Com. 69.

(5) 2 Anders. Hist. Com. [illegible]

(6) 1 Bla. Com. 316.; and s[ee] the Consolidation Custom A[ct] 27 Geo. 3. c. 13. 1 Evans Stat. 4.

ations of the trade now carried on between this kingdom and foreign states, in some cases become an unnecessary burthen upon commerce, without producing any real advantage to the public revenue, and that it is expedient that they should no longer continue," enacts, that the duty, commonly called 'the petty custom,' imposed by 12 Car. 2., and all other additional duties imposed by any act upon the goods of aliens, over and above the duties payable by natural-born subjects, except as thereinafter provided, should cease and be no longer payable. It is then provided, "that the act shall not alter the duties due and payable upon goods imported into or exported from this kingdom in any *foreign* ship, nor the duties of package and scavage, or any duties granted by charter to the city of London:" and then follow provisions to prevent the city from being defrauded of such duties by false entries of aliens' goods in the name of a British subject. Upon which exception it has been observed, that though the city of London still retains a trifling duty called scavage, on the goods of aliens, it is an odious and impolitic tax, and that it would be honourable for the city of London to adopt the liberality of the legislature, and to relinquish it (1). By 35 Geo. 3. c. 56. and c. 92. foreigners employed in carrying on the herring, cod, ling, haddock, or other white fisheries, or the fisheries carried on in the Greenland seas or Davis's streights, or turbot fisheries, &c., taking the oath of allegiance, and obtaining a certificate thereof, may import and export fish duty-free, and with the same advantages as British subjects, and entitled to all the premiums, bounties, &c. granted by 26 Geo. 3. c. 81. and 27 Geo. 3. c. 10., and may be considered as British mariners, subject to similar rules, regulations, penalties, &c.; and by taking the oath specified in this act, may, by an order of the privy-council, have any vessel they may bring into any British port properly registered, and obtain a certificate of registry; which ship shall be entitled to all the privileges of a British-built ship (2); and any person thus qualified is entitled to purchase or take by descent, and hold any estates in lands or hereditaments, not exceeding one hundred acres, in the same manner as any natural-born subject of this kingdom; and such person may import ships, tackle, &c., so as such ships, &c. are not imported by way of merchandize. (3)

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(1) 1 Bla. Com. 316. n. 24. by Christian.

(2) Sect. 7, 8.

(3) Sect. 10, 11.

Aliens interest in *real* property.

Having thus analysed the principal statutes which relate to alien traders, we will now pass from the statute book to shew by other authorities the indulgence with which our law has treated them in all that concerns their commerce. This will be most strikingly observable in those relaxations of the strict rules of *real* property which have been made for the convenience of foreigners trading in Great Britain. *Real* property is a phrase employed by lawyers to denote things permanent, fixed, and immoveable, which cannot be carried out of their places: as lands and tenements (1). And real property, thus understood, is contradistinguished from personal property; which comprehends goods, money, and all other moveables, such as may attend the owner's person wherever he thinks proper to go (2). Now this *real property* our law has in general forbidden an alien *to hold*. "If," says lord Coke (3), "an alien *purchase* houses, lands, tenements, or hereditaments, to him and his heirs, albeit he can have no heirs; yet he is of capacity to *take* a fee simple, but not to *hold*: for upon office found, that is, upon the inquest of a proper jury, the king shall have it by his prerogative of whomsoever the land is holden; and so it is if the alien doth purchase land and die, the law doth cast the freehold and inheritance upon the king." And if an alien purchase to him and the heirs of his body, he is tenant in tail; and if he suffer a recovery, and afterwards an office is found, the recovery is good to bar the remainder (4); but the estate purchased by an alien does not vest in the king till office found, until which the alien is seised, and may sustain actions for injuries to the property (5). But though an alien may *take* real property by purchase, yet he cannot take by descent, by dower, or by the curtesy of England, which are the acts of the law; for the act of law, says sir Edward Coke (6), giveth the alien nothing. Therefore, by the common law (7), an alien could not *inherit* to his father, though the father were a natural-born subject; and the statutes have made no alteration in this respect in favor of persons who do not obtain denization or naturalization. So that an alien is at this day excluded not

(1) 2 Bla. Com. 16.

(2) Id.

(3) Co. Lit. 2 *a. b.* Com. Dig. Alien, C. 2. See the reasons, Bac. Ab. Aliens, C. 2 Bla. Com. 249.

(4) 9 Co. 141. 2 Rol. 321. 4 Leon. 84. Com. Dig. Aliens, C. 2.

(5) 5 Co. 52 *b.* 1 Leonard, 47. 4 Leon. 82. Com. Dig. Aliens, C. 4.

(6) 7 Co. 25 *a.* Com. Dig. Aliens, C. 1. Bac. Ab. Aliens, C. 2 Bla. Com. 249.

(7) Co. Lit. 8 *a.*

only from *holding* what he has taken by purchase, after office found, but from even taking by *descent* at all; and the reasons of this distinction between the act of the *alien himself*, by which he may take, but cannot *hold*,—and the act of the law, by which he cannot even *take*,—is marked by lord Hale in his judgment in the case of Collingwood and Pace (1), where he says, though an alien may take by purchase by his own contract that which he cannot retain against the king, yet the law will not enable him by act of his own to transfer by hereditary *descent*, or to take by an act in *law*; for the law, *quæ nihil frustra* (which does nothing in vain), will not give an inheritance or freehold by act in law, for he cannot keep it. So, in the case of *dower*, which is the third share of the deceased husband's real property, assigned by the common law to the widow, and which accrues to the widow by no act of her own, but by the act of law; an alien woman, widow of a natural-born subject, is incapable of even taking the lands which an English woman would have taken and held, unless she *married* by consent of the king. This is laid down by sir Edward Coke in Calvin's case (2), and in his Commentaries upon Littleton (3), an alien born shall be endowed by the law of the crown; and accordingly there is a special act in the Rolls of Parliament, 8 Hen. 5. No. 15., not printed, which declares that all women aliens who from thenceforth should be married to Englishmen by licence of the king, should be enabled to demand their dower after the death of the husbands to whom they should in time to come be married, in the same manner as English women. An alien shall not be tenant by the curtesy, and the reason assigned in this case is the same as in the instances of *descent* and *dower*: namely, that the title by curtesy is vested by the mere *act* of *law*, which, as we have seen, will not permit a man to take what it will not permit him to hold (4); indeed the analogy between the cases of curtesy and those of descent and dower, is obvious on a moment's consideration of the nature of the estate of a tenant by the curtesy. Tenant by the curtesy, says Mr. Justice Blackstone (5), is a man who has married a woman possessed of lands or tenements in fee simple or in tail, and has had by her issue born alive which was capable of inheriting her estate. In this case he shall, on the death of his wife, hold the lands for his life as tenant by the curtesy of

(1) 1 Vent. 417.
(2) 7 Co. 25.
(3) Co. Lit. 31 *b.* n. 9. Bac. Ab. Alien, 136. 1 Bla. Com. 372.
(4) Calvin's Case, 7 Co. 25 *b.*
(5) 2 Bla. Com. 126.

England. The general rule of the law therefore appears to be, that an alien by *purchase*, which is his own act, may take real property but cannot *hold* it; by *descent*, dower, or curtesy, or any other conceivable act of the law, he cannot even *take* any lands, tenements, or hereditaments whatsoever, much less hold them. The reason of the law's general exclusion of aliens is thus stated by Mr. Justice Blackstone (1), "if an alien could acquire a permanent property in lands, he must owe an allegiance, equally *permanent* with that property, to the king of England; which would probably be inconsistent with that which he owes to his own natural liege lord, besides that thereby the nation might in *time* be subject to foreign influence, and feel many other inconveniences."

In former times these principles appear to have been followed so strictly, that no alien was permitted even to *occupy* a house for his habitation. In Fabian's Chronicle, cited in a note of Rapin's History of England (2), it is said that about the year 1285 merchant strangers were first permitted to *rent houses*, and to buy and sell their own commodities themselves without any interruption from the citizens; for before this they hired lodgings, and their landlords were the brokers who sold all their goods and merchandize for them. The loss of this brokerage, and the favour shewn to aliens, seems to have irritated the citizens of London; for, in the Parliament Roll, 18 Edw. I. A. D. 1289, fo. 1. No. 55, about four years after the commencement of the indulgence, are to be found the following petition and answer. Petition:—The citizens of London petition, that alien merchants may be expelled from the city, because they are enriched to the impoverishment of the citizens, &c. The answer is:—The king intends, that foreign merchants are convenient and useful to the nobles, &c. and has no purpose of expelling them. This petition and answer are cited by Sir Edward Coke (3). The permission to aliens of acquiring an interest in *real* property has not been materially enlarged since the time of Edward I.; and it will be observed, that the relaxations are almost all designed for the advancement of *commerce*. There is a diversity, says Sir Edward Coke (4), between a lease for years of a house for the

(1) 1 Bla. Com. 371, 2.

(2) 1 Rapin, 361. note 9. fol. edit. Bac. Ab. Aliens, C.

(3) 2 Inst. p. 741. Tucker on Trade.

(4) Co. Lit. 2 *b*. Com. Dig. Aliens, C. 3.

habitation of a *merchant* stranger, being an alien, whose king is in league with ours, and a lease for years of lands, meadows, pastures, woods, and the like: for if he take a lease for years of *lands, meadows, &c.*, upon office found, the king shall have it; but of a house for *habitation*, he may take a lease for years as incident to *commerce;* for without habitation, he cannot merchandise or trade; but if he depart or relinquish the realm, the king shall have the lease, &c. (1). But there is a note in the margin of Dyer (2), which asserts that the alien does not forfeit his interest in the house to the king by going beyond sea, if there be *servants* residing in it during the time of his absence. If an alien, continues Sir Edward Coke (3), die possessed of a lease for years of a house, neither his executors nor administrators shall have it, but the king; for he had it only for habitation as necessary to his *trade*, and not for the benefit of his executors or administrators. So if the alien be no merchant, then the king shall have the lease for years, albeit it were for his habitation (4). So that at this day no alien can hold a lease of any house, even for his *habitation*, unless he be engaged in *mercantile pursuits;* a strong proof of the peculiar partiality of the British law to *commerce*. But the indulgence which is thus shewn to alien *merchants*, is not extended to alien traders of a lower kind, *artificers* and *handicraftsmen;* for the 16 chap. of 32 Hen. 8. § 13. enacts, that all leases of any dwelling house or shop within this realm, or any the king's dominions, made to any *stranger*, *artificer*, or *handicraftsman* born out of the king's obeisance, not being denizen, from and after the feast of St. Michael the Archangel then next coming, shall be void and of none effect. Still, however, the British courts, anxious to advance every species of *industry* to the utmost extent which the letter of the written law will permit, have construed this statute most strictly in favour of aliens; and therefore, though the words of the act forbid them to sanction an *actual lease* made to an alien *artificer* or *handicraftsman*, they have held that an agreement for the occupation of a house not amounting to a *lease*, or a tenancy at will, may be supported by

(1) Co. Lit. 2 *b*. Com. Dig. Aliens, C. 3.; but in Teller, 12, it is said an alien may bequeath a lease.

(2) Dyer, 2 *b*. Com. Dig. Aliens, C. 3.

(3) Co. Lit. 2 *b*. Com. Dig. Aliens, C. 3.

(4) Co. Lit. 2 *b*. 1 Rol. 194. l. 30. Com. Dig. Aliens, C. 3. Bac. Ab. Aliens, C.

an artificer or handicraftsman though he be an alien. In the case of Pilkington against Peach (1), the court even took the pains to point out these methods of evasion in the following words, "There are ways to evade the statute; as, to make an agreement for so long as you and I please, at the rate of £20 per annum, and an action of assumpsit will lie thereon; or you shall have my house for so long as you and I please, for so much as it is worth." And Mr. Serjeant Williams, in his note on this case (2), considers it to be decisive of the right of an alien artificer to hold a dwelling house or shop under an *agreement*, which does not amount to a lease, as if he be a tenant from year to year, or for one year or a shorter time: and this note was referred to, apparently with approbation, by Lord Ellenborough, in giving judgment on the case of the king against the inhabitants of Eastbourne, on questions of parish settlement (3), where his lordship decided, that the foreigner whose claim to a settlement constituted the question in dispute, though he might not take a *lease* of a dwelling house or shop, by reason of the statute 32 Hen. 8. c. 16., yet might occupy a tenement of £10 a year, the amount necessary in order to give a right of settlement, and carry on his trade there, like any other person. The same liberality of construction appears to have prevailed in the case of Stevens and Harridge (4); the judges there seem all to have agreed, that though a dwelling house might not be let to an alien by a lease, yet it was lawful for him to take a lease of a *barn* or a *stable*. It should be observed that the 21 Hen. 8. c. 16. § 18. which confirms an order of council therein recited, provides "that no stranger artificer or handicraftsman born out of our obeisance, not being denizen, which at the day of making of this decree is not a householder within this our realm, or keepeth any shop or shops within the said city and suburbs, or any other city, town, or borough within this our realm, shall from that day forward set up and keep any house or shop or chamber within our city of London, suburbs or parishes before rehearsed, or within any other city, town, borough, or village within this our realm, wherein he shall exercise and practise any handicraft or mystery." But it is apprehended that the decisions of the courts have proceeded upon the principle that the words of 32 Hen. 8. b. confining their prohibition to actual *leases*, do

(1) 2 Shower, 135. 1 Saund. 8. n. 1.

(2) 1 Saund. 8. n. 1.

(3) 4 East, 103.

(4) 1 Saund. 6—8. Com. Dig. Aliens, C. 7.

virtually repeal the more general enactments just cited from the 21 Hen. 8.

Doubts have sometimes arisen as to the precise description of persons who are meant by the statute of 32 Henry 8. to be included within the words *handicraftsmen or artificers*. There is a case upon this subject (1), but the decision of the Chief Justice throws little light upon the question. Bridgham the plaintiff brought an action for the performance of covenants in a lease granted by him to an alien vintner: the question was, whether a vintner could be considered an artificer within the meaning of the act; and it was decided that he could not, but for a reason which may be considered as too special, and perhaps too ludicrous, for a guide in future cases. The counsel for Frontee the defendant, argued that mercers, drapers, or grocers, though not properly artificers, were within the meaning of this act. The Chief Justice said, "this statute refers to another of 1 Rich. 2. c. 9. which prohibits alien artificers from exercising any handicraft in England, unless as a servant to a subject skilful in the same art, upon pain of forfeiting his goods; so that it is plain that those who used any art or manual occupation were restrained from using it here to the prejudice of the king's subjects; now the mystery of a vintner chiefly consists in mingling of wines, and that is not properly an *art* but a *cheat*," so the plaintiff had judgment. But even if it were possible to decide what classes of persons shall be deemed artificers or handicraftsmen within the meaning of this statute, the specification of all these classes in this place would be a tedious and unprofitable task; instead therefore of attempting to ascertain who are *artificers* or *handicraftsmen*, the statute 22 Hen. 8. c. 13. may be referred to, by which it is enacted, that certain classes of persons therein mentioned shall not be so considered; these excepted persons are *bakers*, *brewers*, *surgeons*, and *scriveners*.

An alien friend, whilst resident here, is subject to and protected by the municipal law, and he may sue for any personal injury the same as a natural-born subject, and he may act as executor or administrator (2). Aliens are subject to and shall have the advantage of the statutes against bankrupts (3). The property of an alien resident abroad, consisting of stock in the

(1) 3 Mod. 94. Com. Dig. Alien, C. 7. Bac. Ab. Aliens, C.

(2) Bac. Ab. Aliens, C. 2. & D.

(3) 21 Jac. 1. c. 19. s. 15.

public funds or other personal effects in this country, is subject to the controul of the court of chancery (1); and if an alien resident abroad dies intestate, his whole property here is distributable according to the laws of the country where he so resided; but such residence must have been stationary and not occasional, otherwise the foreign municipal regulations will not attach upon the property (2).

(1) 1 Atk. 19.

(2) Ambl. 25. 415. Bac. Ab. Aliens, C. 2.

CHAP. VI.

Of the Navigation Laws of Great Britain, as they affect the Coasting Trade; the European Trade; the Asiatic, African, and American Trade; the Colonial and Plantation Trade; and British Shipping.

HAVING in the preceding chapters considered the right of a state to prohibit or limit her commercial intercourse with other states, it is proposed in the present chapter to compress and illustrate the various provisions of the *navigation laws* by which the legislature of Great Britain has prohibited, or in a certain degree restricted, the intercourse of *foreign vessels* with her own ports, or those of her dependent possessions. It appears to have been the favorite and uniform object of British policy, to confine our foreign trade, as far as was consistent with the extent of it, to the shipping and mariners of this country; and in order to accomplish that object, to hold out peculiar privileges and immunities to the mariners and shipping of Great Britain, and to prohibit, under severe penalties, the communication of those immunities to the shipping and mariners of foreign states. It will not be an uninteresting task to point out how gradually the principles of these laws developed and unfolded themselves, before they were digested into one permanent and regular code.

Antient Navigation Laws.

The act 5 R. 2. st. 1. c. 3. is generally considered as the first of the British navigation laws (1). This act provided that none of the king's liege people should export or import merchandize except in ships of the king's legiance. But this attempt to encourage English shipping having been made before the actual state of our navigation would warrant it, subsequent statutes of the same reign permitted the employment of foreign vessels, when there was not sufficient British shipping, or when the owners of

(1) Com. Dig. Navigation, I. 2. There was a prior act, 42 Edw. 3. c. 8., but this cannot be properly ranked amongst the acts of navigation. See Reeves's Law of Shipping, 2d ed. 9, 10.

the British shipping demanded unreasonable freight (1). The stat. 1 Hen. 7. c. 8. prohibited the traffic in any wine of Guienne or Gascony, unless brought in English or Irish ships, and by mariners of England, Ireland, Wales, Calais, or the marches of the same; and this act having expired, it was revived by 4 Hen. 7. c. 10. and its provisions were extended to Thoulouse woad, with the requisition that the master, as well as the majority of the mariners, should be of one of the countries before mentioned, or of Berwick. These acts are remarkable for having brought forward in a specific form two of the leading provisions of the modern navigation code; viz. the requisition as to the British property of the vessels, and the requisition as to the British character of the master and mariners. The *third* great requisition, the ship should be British-built, was reserved for later times. As to other merchandizes than the wines and woad above mentioned, the same statute 4 Hen. 7. c. 10. permits such general trade to be carried on by merchants strangers in any vessels, but forbids that any other persons inhabiting here shall carry it on in ships belonging to foreigners, except where sufficient British shipping cannot be obtained. But merchandize forced in by stress of weather or enemies was exempted from the provisions of the act. This law was confirmed by statute 32 Hen. 8. c. 14. The policy of these provisions received a check by the 5 & 6 Edw. 6. c. 18., which permitted the importation of the before-mentioned wines and woad in *any vessel*, and with *any* master or mariners; and the acts of 4 Hen. 7. and 5 Rich. 2. were absolutely repealed by the statute of 1 Eliz. c. 13.; but as to vessels, the restrictions were reimposed by the 5 Eliz. c. 5. s. 11.; and several acts about this time, by the imposition of duties upon foreign navigation, enforced the spirit of the British policy: but the only direct provisions were those of the stat. 5 Eliz. c. 5., which forbade the purchase of fish from foreign vessels, in pursuance of the tenor of an act passed in the 33 Hen. 8. c. 2., the earliest of the legislative provisions by which the fisheries are considered as connected with navigation. It was by this statute of Eliz. also, that those parts of our present policy were introduced which relate to the *coasting* trade. The act provided, that no person should cause to be loaden or carried in any bottom, whereof a stranger born was owner, ship-master, or part owner, any kind of fish, victual, wares, or things of what kind or nature

(1) 14 R. 2. c. 6. Com. Dig of Shipping, 11, 12. Navigation, I. 2. Reeves's Law

soever, from one port or creek of this realm to another port or creek of the same, on pain of forfeiting the goods so laden or carried. A permission was given to all persons, being subjects, to export wheat, rye, barley, malt, peas or beans, when they did not exceed certain prices, into any parts beyond sea in vessels whereof English subjects should be the only owners. This statute went further than any of those which had preceded it, by forbidding an alien born to become part-owner of the vessels employed in the coasting trade; and it continued in force till the conclusion of the reign of Charles the first. In the meantime, James the first, by some statutes, charters, and proclamations, enforced the exclusive employment of British shipping in the plantation trade; and there were, besides these, various other provisions made in the reign of Elizabeth and James the first, all tending to the encouragement of the fisheries, and the promotion and increase of English shipping and English mariners (1) The republican parliament of England, in A.D. 1646, encouraged British shipping in the plantation trade by exemptions from duties: and introduced another of the leading principles in our navigation code, that of confining to the mother country the trade of its colonies and plantations. In 1650, another restriction was laid upon the *plantations* in general, which has continued in some degree to the present time. It was in these words: The parliament doth forbid and prohibit all ships of any foreign nation whatsoever to come to or trade in, or traffic with any of the English plantations in America, or any islands, ports, or places thereof, which are planted by and in possession of the people of this commonwealth, without *licence* first had and obtained from the parliament or council of state.

But the most important of all the statutes which passed before the Restoration, was the *famous Act of Navigation* passed by the parliament on the 9th of October 1651. It directed that no goods or commodities whatsoever, of the growth, production, or manufacture o. *Asia*, *Africa*, or *America*, or of any part thereof, or of any islands belonging to them, or any of them, or which are described or laid down in the usual charts or maps of those places, as well of the English plantations as others, should be imported or brought into this commonwealth of England, or into Ireland, or any other lands, islands, plantations, or territories

(1) Reeves's Law of Shipping, 21—26. 13 Eliz. c. 11. 23 Eliz. c. 7. repealed by 39 Eliz. c. 10. 27 Eliz. c. 15. 1 Jac. 1. c. 23. 3 Jac. 1. c. 12.

to this commonwealth belonging, or in their possession, in any other ship or vessel whatsoever, but only in such as did truly and without fraud belong only to the people of this commonwealth, or the plantations thereof, as the proprietors or right owners thereof, and whereof the master and mariners are also for the most part of them of the people of this commonwealth. Having thus secured the import trade of Asia, Africa, and America, the act proceeds to direct that no goods, the growth, production, or manufacture of Europe, or of any part thereof, shall be imported or brought into this commonwealth of England, or into Ireland, or any other lands, islands, plantations, or territories to the commonwealth belonging, or in their possession, in any ship or vessel whatsoever, but in such as do truly and without fraud belong only to the *people* of this *commonwealth*, as the true owners and proprietors thereof, and in no other; except only such foreign ships and vessels as do truly and properly belong to the people of that country or place of which the said goods are the growth, production, or manufacture, or to such ports where such goods can only be or most usually are first shipped for transportation; and no goods or commodities that are of foreign growth, production, or manufacture, and which are to be brought into this commonwealth in shipping belonging to the people thereof, shall be by them shipped or brought from any other place or country, but only those of their growth, production, or manufacture, or from those ports where the said goods or commodities can only, or are or usually have been first shipped for transportation, and from none other place or country. The *fisheries* were the next object of this act, which accordingly provided that no sort of cod-fish, ling, herring, pilchard, or any other kind of salted fish usually fished for and caught by the people of this nation, nor any oil made of any kind of fish whatsoever, nor any whale-fins or whale-bones, should be imported into the commonwealth, or into Ireland, or any other lands, islands, plantations, or territories thereto belonging, or in their possession, but only such as should be caught in vessels that truly and properly belonged to the people of this nation as proprietors and right owners. Nor did the act, in its prohibitions upon foreign shipping, confine itself to *imports* alone; it also ordained that such fish should not be *exported* from any place belonging to this commonwealth in any other ship or vessel than such as truly and properly appertained to the people of this *commonwealth* as right owners, and whereof the master and mariners were for the *most part of them* English.

Finally, the act extended its care to the *coasting trade*, with regard to which it directed that no person whatever should load or carry in any bottom, ship, or vessel, whereof any *stranger* born (unless such as were denizen or naturalized) were owner, part owner, or master, any fish, victual, wares, or things of what kind or nature soever, from one port or creek of this commonwealth to another.

The great purpose of this celebrated act was to cripple the trade of the *Dutch*, who were in those times the greatest mercantile people of the world; "and although this measure brought upon the country an obstinate and bloody war, and though the authority on which this act was founded was unconstitutional and usurped, yet a plan so wise and solid was strenuously maintained by those who formed it; and it was not suffered to pass away with the transient government from which it derived its origin: the great features of it were adopted by the lawful government at the restoration of Charles II., when a *new act* of navigation arose out of the ashes of this, and became the basis of all those laws that have since been made for the increase of shipping and navigation." (1)

The Navigation Act, 12 Car. 2. c. 18. and other modern statutes.

We *now arrive* at that grand and still subsisting act of navigation, the statute 12 Car. 2. c. 18. which has been termed the Charta Maritima of England (2). Those of its provisions which may properly be considered within our present object, are threefold: relating, 1st, to the *coasting* trade of this country; 2dly, to the trade of this country *with other independent states*; and, 3dly, to the trade which she carries on herself, or permits other states to carry on, with her *plantations and foreign possessions*. Though it has been deemed expedient thus to give a short historical sketch of the most material statutes which preceded the Restoration, in order to afford a general view of the antient policy of our ancestors, it will not be necessary to specify in the order of their succession the whole list of important statutes which have been passed *since* the act of 12 Car. 2.; but on each of the heads proposed to be considered, a single

(1) Reeves's Law of Shipping, 1st ed. 53. 2d ed. 40, 1. The origin of this statute has been ascribed by some to the pique of an individual; by others, to the general jealousy entertained by the nation against the Dutch. Ludlow's Memoirs, vol. 1. p. 345.

(2) By Sir Josiah Child, in his Discourse on Trade, Preface. See this statute and other acts in the last volume; and the summary of the provisions in 3 Adolphus, 161—166; and at the end of Reeves's Law of Shipping, 2d edit.

consolidated abstract of the statute law to the present time, with the decisions upon it, will be given, as the most practically useful arrangement of the subject, and which will be considered under four heads: 1st, the *coasting* trade; 2dly, the *European* trade; 3dly, the trade with *Asia*, *Africa*, and *America*; and 4thly, the trade with the *British plantations*, *colonies*, and *foreign possessions*: and we will then consider the general regulations respecting the shipping required in these trades, reserving the examinations of the law respecting fisheries until the next chapter.

1. The Coasting Trade.

First, then, we will examine the regulations which respect the *coasting trade*: that is, the trade from one port of this country to another port of the same country. Upon this subject, the 12 Car. 2. c. 18. s. 6. enacts, that it shall not be lawful for any person to load or carry in any vessel, whereof any stranger born (unless such as shall be denizens or naturalized) be *owner*, part owner, or master, and whereof three-fourths of the mariners at least shall not be English, any fish, victual, wares, goods, commodities, or things of what kind or nature soever the same shall be, from one port or creek of England, Ireland, Wales, islands of Guernsey or Jersey, or town of Berwick-upon-Tweed, to another port or creek of the same, or of any of them, under pain of forfeiting the ship and goods, one moiety to the king, and the other moiety to the informer (1). This enactment merely requires, that the ships used in this trade shall *belong* to British subjects born, or denizens, or naturalized persons; but in order to favor British-built vessels in this trade, the statute 1 Jac. 2. c. 18. enacted, that every foreign-*built* ship or vessel bought and brought into this kingdom, Wales, or the town of Berwick, to be employed in carrying goods and merchandize from port to port, shall pay at the port of delivery, for every voyage, over and above all other duties, five shillings per ton; one moiety to the chest of Chatham, the other moiety to the Trinity Company; and a duty of twelve pence per ton was to be paid by those foreign ships already employed in the coasting trade. These two provisions existed until the year 1786. In the former state of ship-building in England, it may be presumed, that to have entirely excluded foreign-built ships, though manned and owned as directed by the sixth section of the navigation act, would have given too great a check to the commerce of the country, then in its infancy and struggling with the matured establishments of the Dutch; and would in fact have left us no ships to form that

(1) Reeves, 1st edit. 278, 9; 2d ed. 214, 15.

school for our future seamen, which the legislators who framed this section contemplated, as a prior measure to the exclusion of foreign-built ships altogether. In the words of the present Lord Chief Justice of the King's Bench (1), it was reserved for the present reign to see the ship-building of the country advanced to such a state, as to warrant the confinement of the privileges of our trade to ships *built* within the king's dominions, or taken as prize in war: accordingly, this measure was carried into execution by the statute 26 Geo. 3. c. 60.; reserving, however, to such foreign-built ships as were *then* the property of his Majesty's subjects, the privileges to which they were then entitled by the existing laws. For the more effectual execution of this important measure of public policy, various new regulations were at the same time introduced, to ascertain the built and property of ships, which have been since improved by subsequent statutes, as experience shewed that some particulars, notwithstanding the great attention paid to the original statute, and the great talents employed in framing it, had not been sufficiently provided for by it (2). And now, by 34 Geo. 3. c. 68. (which is extended to Irish ships by 42 Geo. 3. c. 61.), for the further encouragement of British mariners, it is provided, that no goods whatever shall be carried from any one port, member, or creek or place of Great Britain, or of the islands of Guernsey, Jersey, Alderney, Sark, or Man, to any other port, member, creek, or place of the same or any of them, in any vessel required to be registered as a British vessel, nor shall any such vessel be permitted to sail in ballast from one of the said ports or creeks to another, or be employed in fishing on the coasts of Great Britain, unless *such vessel* shall be *wholly and solely* manned with and navigated by a master and mariners *all British subjects*, with a proviso that the commissioners of the customs may authorize vessels to have foreign mariners to instruct British ones in fishing. The act then points out who shall be deemed British seamen, and provides that goods imported or carried coastwise contrary to the provisions of this act, and the ship and her tackle, shall be liable to seizure and forfeiture. There are several recent regulations to prevent smuggling under color of coasting trade, but which do not properly apply to this part of our subject.

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(1) Abbott on Shipping, 26. 4th ed.

(2) 27 Geo. 3. c. 19. 34 Geo. 3. c. 68. 35 Geo. 3. c. 58. 37 Geo. 3. c. 63. Abbott, 27.

II. Trade of Great Britain with Europe.

2dly. We are next to consider the trade of this country with *Europe*. By the navigation act 12 Car. 2. c. 18. s. 8 (1), it is enacted, "that no goods or commodities of the growth, production, or manufacture of *Muscovy*, or of any the countries thereto belonging; as also no sort of masts, timber, or boards; no foreign salt, pitch, tar, rosin, hemp, or flax; raisins, figs, prunes, or olive oils; no sorts of corn or grain, sugar, potashes, wines, vinegar, or spirits called aqua vitæ, or brandy wine, shall be *imported* (2) into England, Ireland, Wales, or town of Berwick-upon-Tweed, in any ship or ships, vessel or vessels whatsoever, but in such as do truly and without fraud belong to the people thereof, or some of them, as the true owners and proprietors thereof, and whereof the master and three-fourths of the mariners, at least, are English; and that no currants nor commodities of the growth, production, or manufacture of any of the countries, islands, dominions, or territories to the Othoman or *Turkish* empire belonging, shall be *imported* into any of the before-mentioned places in any vessel but which is of *English built, and navigated* as aforesaid, except only such foreign ships and vessels as are of the *built* (3) of that country or place *of which the said goods are the growth, production, or manufacture* respectively, or of such port where the said goods can only be *or most usually are* first shipped for transportation (4), and whereof the master and three-fourths of the mariners, at least, are of the said country or place, under the penalty and forfeiture of ship and goods, as in the statute directed."

The exception as to foreign ships is construed to apply not only to Turkey, but to Russia, and to all the enumerated articles (5). But a ship not originally built in Russia, but only *repaired* there, though at an expence of more than two-thirds of her value, and owned by a Russian subject, and navigated under

(1) A licence by the king contrary to this statute was declared void by proclamation two years after the passing it. Anders. Hist. Com. vol. 2. p. 473. Reeves on Shipping, 2d ed. 154, 5. See this section, post, last volume.

(2) As to the meaning of the term *imported*, see post, and Reeves, 2d ed. 194. 196.

(3) See Redhead v. Cater, 4 Campb. 188. 1 Stark. 14. S. C. post, 177. n. 1. 185, 6.

(4) Trieste, Venice, Genoa, and Leghorn are now considered as ports which by *usage* are entitled to privilege for the export of Asiatic goods from the Levant. Reeves, 2d ed. 108. n. (a); and see 55 Geo. 3. c. 59. as to Malta.

(5) Reeves, 1st ed. 198. 2d ed. 151.

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the Russian flag, is not to be considered as a Russian-*built* ship (1). The prohibition to import except only in English ships, or ships of the country whence the commodities come, does not extend, as it did in the old act, to *all* Europe, but only to the goods of *Russia* and *Turkey*, and *certain enumerated articles*, leaving the rest of European merchandize to be *imported* in any ship, however navigated, and from any port; but a late act has altered this law as regards *importation* in *British* ships (2). But in order to prevent frauds on the customs by the concealment of aliens' goods, the commodities enumerated in the 8th section (wine and vinegar excepted), and the goods of Russia and Turkey were by the 9th section to be deemed aliens' goods, if imported in other vessels than English-built and manned, and to pay aliens' duty accordingly; and the clause extended to wines of the growth of France and Germany, or Spain, the islands of the Canaries and Portugal, the Madeira and Western islands: but from the repealing of the aliens' duty (3) this clause is now of no avail, except as far as the duty called town dues is concerned.

This act occasioned great complaints by the neighbouring states; but the advantages resulting from the enactment induced the legislature to enforce its object. It was found that plantation goods used to be carried to Holland, and being manufactured there, were in that shape introduced into England; and this, with other circumstances, left a very considerable carrying trade to the Dutch; and accordingly, in the following year, another act was passed to compel the British merchants to go on longer voyages, and by that means still more to extend the shipping and navigation of Great Britain (4). This act (13 & 14 Car. 2. c. 11.) was passed, which, in the 23d section, provides that no sort of wines (other than Rhenish), no sort of spicery, grocery, tobacco, pot ashes, pitch, tar, salt, rozin, deal boards, fir timber, or olive oil, shall be imported into England, Wales, or Berwick, from the Netherlands or Germany, upon any pretence whatsoever, in any sort of ships or vessels whatsoever, upon penalty of the loss of all the said goods, as also of the ships and furniture. This enactment prohibits the importation from the Netherlands and Germany of all wines except Rhenish (5). In point of practice,

(1) Supra, 176. n. 3. post, 185, 6.
(2) See post, 181. stat. 34 Geo. 3. c. 68. Reeves, 2d ed. 341.
(3) 24 Geo. 3. c. 16. 160, 1.
(4) Reeves, 1st. ed. 202. 2d ed. 155.
(5) Reeves, 1st ed. 216. 2d ed. 166.

several other wines besides Rhenish had been brought from the Netherlands and Germany, as Moselle and Neckar wines. The extent of the prohibition, as to this point, was submitted to the law officers: and it was the opinion of Sir Thomas Trevor, that wines of the growth of Hungary are not restrained by this statute from being imported from the Netherlands and Germany; for, in his opinion, the exception in favour of Rhenish wine extended to all wines of the growth of Germany or the emperor's dominions *thereabouts*, and was not to be confined to the strict literal sense of the words, namely, to such wines as grow on the borders of the Rhine, but must be taken according to the common acceptation of the word, by which all wines of the growth of Germany or the emperor's dominions were generally called Rhenish; which construction was fortified, in his judgment, by the usage since the making of the statute, of allowing other wines of the growth of Germany to be so imported. (1)

The passing of this last act was a severe blow to the shipping of Holland; and in a treaty with the States General and this country, signed at Breda, July 1667, king Charles stipulated for the repeal of this law; but which was never done or even mentioned in the houses of parliament (2). After some lapse of time, a relaxation was granted in favour of Germany, whereby Hungary wines are permitted to be imported from Hamburgh (3); and a further relaxation was granted by 6 Geo. 1. c. 15., which permits, in the second section, to any of the king's subjects to import fir timber, fir planks, masts, and deal boards of the growth of Germany, from any port or place of Germany into this kingdom in British-built ships only, owned by his Majesty's subjects, and whereof the master and three-fourths of the mariners are British subjects.

The 8th section of the navigation act, 12 Car. 2. c. 18., has also undergone some other material alterations; for the stat. 22 Geo. 3. c. 78. enacted, that wines being the growth, production, or manufacture of Hungary, the Austrian dominions, or any part of Germany, may come from the Austrian Netherlands, or any place subject to the emperor or the house of Austria, on the

(1) Reeves, 1st ed. 216. 2d ed. 158.

(2) Reeves, 1st ed. 206. 2d ed. 166.

(3) 1 Ann st. 1. c. 12.

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same duty as Rhenish wine; as also organzine thrown silk upon the same duty as if imported from Italy. And by the third section it was declared, that any person might import into Great Britain any sort of timber, or any of the articles mentioned in the 8th section of the 12 Car. 2. c. 18., from any foreign place in Europe, in any vessel being the property of subjects under the same sovereign as the country of which the goods are the growth, production, or manufacture, although the country or place where the vessel was *built, or to which she might belong*, was not under the dominion of such sovereign at the time of the passing of the navigation act. But the impolicy of this clause, in favor of foreign shipping, was very soon discovered; and accordingly another statute was passed (1), restraining the general operation of that act, and at the same time modifying very considerably the 8th section of the navigation act. This enactment allows any of the goods enumerated in 12 Car. 2. c. 18., being the growth, production, or manufacture of Europe, to be imported into Great Britain under the regulations of the 13 & 14 Car. 2. and the 6 Geo. 1. c. 15., either in vessels which before the time therein mentioned did wholly belong to his Majesty's dominions, or which were of the built thereof, and registered respectively according to law; or in vessels *the built* of any countries or places in Europe belonging to or under the dominion of the sovereign or state in Europe of which the goods are the growth, production, or manufacture; or of such ports where the said goods can only be or are most usually first shipped for transportation, such vessel being navigated with a master and three-fourths of the mariners, at the least, belonging to such countries or places, and in none other vessels whatever. By this last-mentioned clause, the third section of the 22 Geo. 3. c. 78. is in part virtually repealed; and ships to import these articles are again required to be of a certain built, as by the old law (2): but by the provisions of the 10th section of 27 Geo. 3. c. 19., the built of such vessels need not, as required by the 8th section of 12 Car. 2. c. 18., be of the very country of production, but only of some country under the same sovereign: but it must be observed, that such vessels must be of the *built* (3) of some one of those countries, and not merely *belong* to them, which satisfied the third section of 22 Geo. 3. c. 78.

(1) 27 Geo. 3. c. 19. s. 10. Reeves, 2d ed. 188. 338—341.

(2) Reeves, 1st ed. 382. 2d ed. 340.

(3) Ante, 176. n. 3. 177. n. 1.

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And it will also be perceived, that under this clause ships of the built of such countries that were not under the same sovereign at the time the navigation act was passed, may claim the privileges of it. It was intended by this act to restore the law to the state it was in under the navigation act, subject to the prohibitory clauses of 13 & 14 Car. 2. c. 11. and 6 Geo. 1. c. 15.; and it is so expressly provided by the terms of the act itself: the construction therefore has been, that where British ships are required by the 12 Car. 2. c. 18. s. 8., they must still be employed (1).

The statute 27 Geo. 3. c. 13. also in some measure affects the trade of this country with Europe. The principal provision of this statute, commonly called the consolidation act, and made in order to carry into effect the commercial treaty with France, negotiated in 1786, relates chiefly to the wine and olive oil of that country, which had both been prohibited to be imported from the Netherlands (2): it provides, that French wines might be imported in casks from any place in European dominions of the French king, in such manner and under such regulations as they might then by law be imported from France; and also French wines in bottles or flasks, as well for sale as for private use, in the same manner and under the same regulations as they might then be imported from France for private use; and also that olive oil, the product or manufacture of France, or any place in the European dominions of the French king, may be imported from any part of the Netherlands belonging to or under the dominion of the French king, in English-built ships, owned and navigated according to the laws then in force, and as therein is expressed in the 22d section. The clause in the 27 Geo. 3. c. 19. which we have already considered, also relates to this subject (3). The trade with France is directed by these laws, and the treaty of peace of 1814; on which treaty another act, 56 Geo. 3. c. 9., was passed, imposing a duty on the tonnage of French packets in England equal to that demanded in France for British packets; and which act, it was the opinion of the law officers, only extended to vessels used as packets. (4)

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(1) Reeves, 2d ed. 338. 340. Pope's Law of Customs, tit. Navigation.

(2) Reeves, 1st ed. 380. 2d ed. 341, 2.

(3) Ante, 179.

(4) Pope's Law of Customs and Excise, title lxix. title France.

The two clauses in stat. 34 Geo. 3. c. 68. considerably affect the British shipping employed in the import and the export European trade. All articles of this trade not enumerated or included in the eighth section of the 12 Car. 2. c. 18. being under no prohibition or restriction whatsoever, might be imported in any ships, whether British or foreign-built, *howsoever manned or navigated*; but this act, by enacting that no ships registered or required to be registered as a *British* ship shall *import or export any articles whatsoever*, unless navigated by a master and three-fourths at least of the mariners British subjects, has put *all imports* in *British* ships under the same restriction with those included in the eighth section of the navigation act. But, except as to the produce of Russia and Turkey, and other particular commodities specified in the navigation act, any *foreign* vessel may import into Great Britain, goods the produce or manufacture of Europe, from any place in Europe. II. Trade of Great Britain with Europe.

There are still, however, some few acts remaining that in some of their clauses affect the European trade; the first statute of this nature was that passed in the reign of William and Mary, for the purpose of encouraging our own *silk manufactures*. It was found that raw silk was exported from Asia into Italy, and there converted into thrown or manufactured silk, and then imported into this country to the injury of our manufactures: to prevent this evil, and the more especially as raw silk was alone allowed to be brought from Asia in English bottoms, the act of 2 W. & M. sess. 1. c. 9. (1) declares that throwing of silk is not nor ought to be construed a *manufacture* within the intention of the navigation act, 12 Car. 2. c. 8.; and that no *thrown silk* of the growth or production of Turkey, Persia, East Indies or China, or of any other country or place, (except only such thrown silk as is or shall be of the growth or production of Italy, Sicily, or of the kingdom of Naples, and which shall be imported in such ships or vessels, and navigated in such manner as in the said act of navigation is directed or allowed, and brought from some of the ports of those countries or places whereof the same is of the growth or production, and

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(1) See also 27 Geo. 3. c. 19. s. 10. Reeves, 2d ed. 502, 3.

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which shall come directly by sea and not otherwise (1)), shall be brought or imported into the kingdom of England, dominion of Wales, the islands of Jersey or Guernsey, or the town of Berwick-upon-Tweed, under the penalty and forfeiture of all such thrown silk so imported contrary to the meaning and intent of that act; one moiety to the king and the other to the informer, to be recovered as therein mentioned. So that only such silk as is really the growth of Italy, Sicily, and Naples, may be imported within the meaning of the navigation act. Yet during *war* the prohibition has been frequently relaxed, and the importation of thrown silk from a friendly country permitted in any vessel whatever. (2)

There is, however, one European production, namely the *timber* of Germany, which the act of Car. 2. allowed to be imported in vessels of the country of which it was the growth or production, or in vessels of the most usual port, but which the stat. 6 Geo. 1. c. 15. confines to English shipping alone. This statute repeals a previous prohibition forbidding the importation of timber from Germany in any ships whatsoever, and allows its importation in British vessels; enacting, in the second section that it shall be lawful for any of his Majesty's subjects to import any quantity of fir timber, fir planks, masts, and deal boards, being of the growth of Germany, into this kingdom, from any port or place in Germany, in British-built ships only, so as the owner or owners are his Majesty's British subjects, and whereof the master and three-fourths of the mariners at least are British subjects. The previous prohibition spoken of in the last-mentioned statute (3), was that contained in the 13 & 14 Car. 2. c. 11. s. 23., of which we have already spoken, and which was repealed by it only as far as it related to the importation of timber from Germany; and afterwards it again underwent a further modification by a statute of the present king (4), which repeals that part relating to *prunes* the produce of Germany: but this clause is still partly in force. There are other acts

(1) Mr. Reeves, 2d ed. 152, 3. 502. treats this enactment as a mere nullity, because there has been no such provision in the navigation act; but that observation seems only to apply to the exception, and therefore no sort of thrown silk under this act can be imported, unless when permitted by a war act, as 43 Geo. 3. c. 153. See post, 194, 5.

(2) 43 Geo. 3. c. 153.

(3) 6 Geo. 1. c. 15.

(4) 56 Geo. 3. c. 37.

which affect particular branches of European trade, but as they are very numerous, and are not of a general nature, the limits of this work render it advisable not to notice them.

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Usages qualifying the constructions of these acts.

Some of the clauses in the prohibitory acts we have just considered being rather loosely worded, it appears that custom and general *usage* having introduced a practice not altogether compatible with the provisions themselves, the statutes have been construed more liberally, to prevent forfeiture, than their strict meaning would allow. We have already adverted to one of these usages, in regard to the admission of certain *wines* from the Netherlands and Germany, and an opinion upon it (1); and Sir John Hawles agreed in this opinion as far as it regarded all wines of Germany (2). *Pitch* is one of the articles prohibited by statute 13 & 14 Car. 2. c. 11. to come from the Netherlands; but when *white* pitch, the product and manufacture of Germany, was imported from Rotterdam, it was held by Mr. Warde, that if it had been the *constant usage* ever since the act to allow it to be so imported, that might give some light to the intention of the law, that this commodity had not been looked upon as pitch within the intent of the legislature (3). *Grocery* was another of the articles expressly prohibited to be brought from the Netherlands and Germany by 13 & 14 Car. 2. c. 11. s. 23., and under this name an article called anniseed was included in the Book of Rates. It appears that some anniseed had been imported from Hamburgh and seized, it being declared unlawful to import such articles into this country from Holland, in any ship whatever. The importer contended it could not have been in the contemplation of the legislature to prevent the importation of any article direct from the place of its growth; and anniseed being only used in physic could not properly be rated as grocery in the book of rates. This question was submitted to Sir Edward Northey, who said that it was very reasonable to restrain the operation of the statute to such goods concerning which there was a doubt, after the passing of the navigation act; and therefore, as the doubt respected European goods imported from Holland or Germany, not of the growth of those places, he did not think it reasonable to disturb the merchants making such importation; but he nevertheless thought that anniseed was grocery because so classed in the book of

(1) Ante, 178.
(2) Reeves. 2d ed. 167.
(3) Reeves, 2d ed. 166.

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rates (1). Holland being then considered as a part of Germany, it became a custom to admit *juniper berries*, on the low duty of the growth of Germany, to be imported from Holland as from the place of growth, a custom, considering Holland as no part of Germany as is now the case, by no means reconcilable to the law, as declared by the act of 13 & 14 Car. 2. c. 11.; but Sir Dudley Ryder thought this usage might be maintained if it were *res integra*. In the year 1708 it became a question whether *French wines* could be imported for the queen's use contrary to this statute; and it was held by Mr. Powis, Mr. Northey, and Mr. Harcourt, that her Majesty might import such wines for her own use; but Sir James Montague was of a contrary opinion, as far as the usual course of trade was concerned; but he thought they might in one of the queen's own ships, under certain restrictions (2). Thus far then it appears that long established usage has been allowed to controul, even the special enactments of an act of parliament; and it is fair from these instances to presume, that in all other cases long usage may be sufficient to prevent a forfeiture which would otherwise be incurred.

Decisions and opinions on 8th section of navigation Act.

We will now proceed to consider the construction of the eighth section of the navigation act, as explained by the different decisions and opinions upon it. In the case of Scott v. Schwartz (3), it was laid down by Chief Baron Comyns, that the words describing the ships in which Russia goods should be imported, "such as belong to the people *thereof*," (4) must mean the people of Russia; but this decision was afterwards overruled in the case of Scott v. D'Achey, in which it was settled to mean British ships manned with British subjects (5). Upon the decision of Chief Baron Comyns, Mr. Reeves observes (6), that a very little verbal criticism would have drawn from the above words a very different construction; for, in the first place, it is not only the goods of Russia that are in question, but also various enumerated goods which are not expressed to be the produce of any particular country; and therefore when we

(1) This case is not likely to occur again, because the new consolidation act, 43 Geo. 3. c. 68. does not retain the head of grocery, but names all the articles of it in their proper alphabetical order. Reeves, 2d ed. 158.

(2) Reeves, 2d ed. 170.

(3) Comyns, 677.

(4) See the section ante, 176.

(5) Parker's Rep. 27. 29.

(6) Reeves, 1st ed. 226. 2d ed. 175.

admit that "*ships belonging* to the people *thereof*" may, when referred to Russia, have an antecedent to which they may refer, it may be asked, what people are referred to, where no country is mentioned as the place where the enumerated goods are produced? that in all cases, except that of Russian commodities, this construction upon these words would leave them without effect or meaning. In the next place, this construction seems to be taken contrary to the obvious method of tracing the antecedent referred to; for the words being, "that no goods, &c. of Russia, &c., nor any masts, &c. shall be imported into England, Ireland, Wales, or Berwick, in any ship or vessel whatsoever, but such as do truly and without fraud belong to the *people thereof*, or some of them, as the true owners and proprietors thereof, and whereof the master and three fourths of the mariners at least are English;" the natural construction is to refer "the people thereof" to the last antecedent, viz. *England*, *Ireland*, *Wales*, and *Berwick*, and not to Russia. Lastly, upon comparing this description of the ships and the manning of them, with other descriptions of ships in the same act, it appears to be the same form of words as is used in various places in the former parts of the act to describe *English shipping*: it is used in the first section, to describe the shipping for the plantation trade; in the third section to describe those that are to bring the commodities of Asia, Africa, and America; it is nearly repeated in the fourth section; and as much of it as regards ships, is used in the fifth section, relating to fisheries: it is likewise used in several parts of the act subsequent to the eighth section.

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The exception at the *close of the eighth section* has occasioned some discussion (1), "except only such foreign ships as are of the built of the country or place of which the said goods are the growth, production, or manufacture, or of such port where the goods can only be, or most usually are first shipped for transportation, and whereof the master and three-fourths of the mariners at least are of the said country or place (2)." Upon this exception to the section it has been held that a ship is not of the *built* of Russia within the meaning of the navigation act, which, having been originally constructed in another country, was wrecked on the coast of Russia, and repaired there at an expence of more than two-thirds of her value, although by the

(1) Reeves, 1st ed. 230. 2d ed. 176.

(2) See the section ante, 176.

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law of Russia she was under these circumstances to be considered a Russian-built ship; and although she afterwards had a Russian register, and was owned by a Russian subject, and was navigated under the Russian flag. And Lord Ellenborough said, "I hold "repair" is not "built," a ship must be of the built of the place where she was originally constructed; and while her identity continues, it is impossible in the nature of things that the place of her birth should ever be altered: the law of Russia cannot be of force to controul the navigation act of Great Britain; the importation into England of Russian produce in such a ship was certainly illegal. (1)

The most material doubt upon the words of the above exceptions was, whether they applied only to the latter part of the section relating to currants and the Turkey trade, or extended to the whole of the section: it was maintained by the crown lawyers in the before-mentioned case of Scott v. Schwartz (2), that it was confined to the Turkey trade; but this was overruled by the Chief Baron Comyns, who clearly thought the exception extended to the whole section; upon the consideration, that all the goods of Russia and the enumerated goods, as well as currants and the commodities of Turkey, are all declared in the ninth section to be aliens goods, if they are imported in other than English shipping. The case of Scott v. D'Achey (3) was as follows: An English ship having become French property, imported French wine and vinegar from France, the master and three-fourths of the mariners being French. In favor of this ship it was objected that the main design of the act was, that the English and not foreign nations should be carriers, and therefore they may carry as well in foreign-built ships being their property as in ships of the built of their own country, if they qualify them according to the tenth section, and navigate them with a master and three-fourths of the mariners English; and this is enforced in the eleventh section. Again, if a foreign ship may have the privilege of an English ship, *pari ratione*, or rather *à fortiori*, an English ship being foreign property, should be entitled to the like privilege, taking the encouragement of ship-building to be the second consideration of the act. To these objections it was answered and resolved by the Chief Baron Parker, that they were indeed specious, but were founded on a supposition, that

(1) Redhead v. Cater, 4 Campb. 188. 1 Stark. 14. S. C.

(2) Comyns Rep. 677.

(3) Parker's Rep. 30.

we could have prohibited the importation of European goods in foreign bottoms; but as that could not at that time be done with safety to our trade, the force of the objections vanished. It was seen, said he, that many countries in Europe, as France, Spain, and Italy, could more easily buy ships than build them; that, on the other hand, countries like Russia and others in the North, had timber and materials enough for building ships, but wanted sailors: it was from a consideration of this inaptness in most countries to accomplish a complete navigation, that the parliament prohibited the importation of most European goods, unless in ships owned and navigated by English, or in ships of the built of and manned by sailors of that country of which the goods were the growth: the consequence would be, that foreigners could not make use of ships they bought, though English subjects might; this would force them to have recourse to our shipping, and the general intent of the act, to secure the carrying trade to the English, would be answered as far as it possibly could: on the other hand, if foreign property had been sufficient to qualify ships, foreigners might have bought ships where they pleased, and manned them with their own sailors; and then not only the freight but the employment of our sailors would have been lost to England; and preventing this must greatly counterbalance any advantage that could accrue to England from the building and equipping ships for foreign use; which too being a secondary consideration in making the act, was not to defeat the primary one. The Chief Baron remarked, that with all the desire the parliament had to encourage English shipping, and notwithstanding they had with that view required the productions of our own colonies, and those of Asia, Africa, and America, to be imported only in English shipping; yet they wisely foresaw that if they restrained the importation or exportation of European goods unless in our own ships, and manned with our own seamen, other states would do the same; and this in its consequences would amount to a prohibition of all such goods; which would be extremely detrimental to trade, and in the end defeat the very design of the act.

II. Trade of Great Britain with Europe.

To what country the masters and mariners must belong.

The requisite that "the *master and three-fourths of the mariners should be of the same country or place*," led also to considerable discussion. This point was decided in the case of Scott and Schwartz (1); and in which it was adjudged to be the design of

(1) Comyns' Rep, 677.

II. Trade of Great Britain with Europe.

the act, that no foreign ships should import any of the goods enumerated and described in this 8th section, if *mariners* were brought from any *foreign* kingdom to navigate them. From the same case we may further collect, that though the act does not precisely fix and determine who shall be the *people* of a *country*, yet it gives a larger extent and signification to the phrase than belongs to the term *natives*; and the precise meaning of it is left to the general import and common understanding of the words. In this case of Scott and Schwartz, there was a ship Russian-built from Riga, navigated by a master who was born out of the Russian dominions, but who had nine years before been admitted a burgher of Riga, and had ever since continued so, residing there when not engaged in voyages. There were eleven mariners, four of whom were born in Russia; the fifth was born in Ireland, there bound apprentice to the master, and as such went with him to Riga: for three or four years before the seizure he served on board this ship, and sailed in it from Riga on the present voyage. The other six were born out of the dominions of Russia; but one had resided at Riga for eight years next before the seizure; another five years; another four years; another seven years; and the last four had, during the same period, sailed from Riga in that and other vessels. It was understood that there was no such thing as naturalization known in Russia. The Chief Baron Comyns was of opinion, that the master being a burgher, and having taken an oath of allegiance to the empress, as was proved on the trial, there was hardly any thing more cogent than this to denominate a man of a country: he must be a subject of the empress. As to the other four mariners, he thought them to be people of the country within the meaning of the act; first, because the act seems to intend nothing more than fixed and settled inhabitants there; and a residence of four or five years might well satisfy that expression: secondly, because it seemed to answer the intent of the act, which was not so much to create difficulties to other countries to find mariners amongst themselves, as to prevent their supplying themselves with them from other countries than England: thirdly, because, by the civil law, such a residence gives a country a right to the resident's service: fourthly, because, in the present case, it was not found by the special verdict that these persons had ever any habitation or residence out of the empress of Russia's dominions; and what does not appear is not to be intended. It was found that they had made several voyages from Russia; but it did not appear that they had made any voyage from any other country; so that

they might properly be said to be mariners of Russia, but not of any other country: and as the act speaks of mariners of the country, and does not say mariners born in the country; and as mariners is a denomination they must acquire, for they cannot be born mariners; if therefore they were of that country while they were mariners, and never were mariners of any other country, they seem to satisfy the words and intent of the act. Upon the whole it was said, that it would be almost impracticable, and make commerce very hazardous, if a merchant was to search out the nativity of every mariner he employed, and in case of mistake or misinformation, was to forfeit his ship and cargo.

II. Trade of Great Britain with Europe.

A question having arisen, whether a natural-born subject of his Majesty, admitted a burgher of Memel, could be considered a subject belonging to the king of Prussia for the purposes of the *navigation* act, so as to be master of a Prussian vessel; it was stated, by order of the board of customs, dated 9th August, 1816, that his Majesty's law officers had given it as their opinion that a British natural-born subject cannot by taking the oaths of allegiance to the sovereign of another state throw off the natural allegiance belonging to his own (1); but that he may by residence, or other acts required by the municipal law of another state, acquire the character of belonging to such other state for commercial purposes, so as to be entitled to the privileges granted to the subjects of, or to persons belonging to such other state, when the acts he thereby performs, do not amount to a breach of allegiance due to his own country; and that an Englishman domiciled in a foreign country, and who has taken such oaths as to entitle him to the commercial privileges of such state, may be considered as belonging to such state for commercial purposes (2). But, on the other hand, where a Scotchman who had been made a burgher of Stockholm was the master of a Swedish ship navigated with Swedish mariners, Sir Philip Yorke apprehended this would not entitle him to be considered as a Swede in Great Britain, his native country: with regard to his own country, he continued a natural-born British subject; and would, in his opinion, still continue a good British master, to navigate a British-built ship with British mariners, which seemed to shew that he could not be considered here as a Swedish master, to

(1) See ante, 128. 9.

(2) Pope's Law of Customs and Excise, tit. Navigation. And see 8 T. R. 39. 43. 45. Reeves, 2d ed. 328. 330.

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navigate a Swedish ship; but as this was a new case, he thought it would be hard to take advantage of the forfeiture. (1)

If a ship comes out of a foreign country properly manned, and the men die on the voyage, and others of England or Holland are taken in to supply their places, this case of necessity will prevent the forfeiture: an allegation, however, that the men deserted is liable to supicion, and is not so likely to be received as an excuse. It should seem, that if there were not full three-fourths mariners of the country, and the master properly qualified, when they came out of the country or place, nothing that can be done afterwards to qualify navigation ought to be admitted (2). The recent act for encouragement of British mariners contains regulations on this subject, which we will consider towards the close of this chapter. (3)

Upon the transfer of a town from one sovereign to another, it seems to be the general opinion, that the town or country transferred is affected by the navigation laws, according to the terms of the transfer. Thus the town of Dunkirk came by treaty from the French monarch to the crown of England provisionally only; and Sir Edward Northey said, that as the town was in her Majesty's possession *provisionally only*, French wine could not be imported from thence; but it might be otherwise if an absolute assignment had taken place. (4)

It appears that some difficulty arose on comparing the eighth and ninth sections of the navigation act with the sixth section of 13 & 14 Car. 2. c. 11.; for it was then a doubt whether a foreign-built ship, English owned and navigated, could import wines from France, or timber from Norway; but this doubt has long since been removed by the enactment in the present reign (5). The kingdoms of Denmark and Sweden being at war, it became a question in what light a prize ship taken by one of these nations from the other should be considered by the navigation act. Sir Edward Northey thought that a Danish ship being taken prize by the Swedes, and properly condemned in the Swedish

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(1) Reeves, 2d ed. 193.; but see 8 T. R. 34. 49. 45. Reeves, 2d ed. 328. 330.

(2) Reeves, 2d. ed. 193.

(3) 34 Geo. 3. c. 68. s. 5.

(4) Reeves, 2d ed. 171. 26 Geo. 3. c. 60. 34 Geo. 3. c. 68.

(5) Reeves, 2d ed. 172. 34 Geo. 3. c 68.

court of admiralty, the property was altered, but not sufficiently so to enable a Swede to trade in that ship with this country within the navigation laws; and this seems to be reasonable enough; for though prize ships with us are favored the same as British-built, this is by special provision in an act of parliament; and indeed it can hardly be thought that the legislature ever intended to hold out inducements to foreign nations to attack and take the ships of this country, which most certainly would have been the case had the ships so taken been held to be competent to import articles of the growth of the place, in the same manner as ships of the built of the country are allowed by our navigation system; a consideration quite sufficient to silence all doubt on the point, but which seems to have escaped the notice of the many eminent lawyers of those days: and nothing similar being enacted with regard to ships taken prize by any foreign power (except America) (1), that circumstance cannot make them of the built of that country. Where English-built ships were sold to foreigners and navigated by them, there had been a difference of opinion and of practice as to the qualification of such ships; some holding that they were qualified under this section of the act of navigation, others that they were not. This question is of much importance, as the return of peace has *ipso facto* repealed some of those laws that greatly contributed to set this matter at rest, and the more especially an act of George the second (2). An English-built ship, sold to the subjects of the duke of Tuscany, imported oil from Naples: it was held by Mr. Browne that the ship might legally be admitted to an entry: this was the first opinion to be found upon this point; but Sir Edward Northey seems to have been of a contrary opinion; and he lays it down as illegal, under 12 Car. 2. c. 18., to import wine of the growth of Italy from Leghorn in an English ship, *owned and navigated by Italian subjects*: and again, where an English ship taken prize by the French, and navigated by a master and three fourths of the mariners French, imported French wines, he was still of the same opinion: and notwithstanding this doctrine of Sir Edward Northey was not maintained by Sir Dudley Ryder and Sir John Strange without some doubt, it was afterwards affirmed by the decision of Chief Baron Parker, in the case of Scott v. D'Achey, before spoken of. (3)

II. Trade of Great Britain with Europe.

(1) This very inducement is held out to the Americans, by statutes 37 Geo. 3. c. 97. and 41 Geo. 3. 95. Reeves, 2d ed. 498.

(2) 17 Geo. 2. c. 69.

(3) Ante, 187. 8.

II. Trade of Great Britain with Europe.

The construction of the eighth section, as to the terms *country or place* of growth of the article, as well as of the built of the ship, has likewise been productive of some doubts, whether they are to be understood geographically, or whether according to their sovereignty. The latter appears to be the proper construction; but the sovereignty must be such as existed at the time of the navigation act, except so far as that point was altered by the act of the present king, before considered (1). The opinions that here follow, it will be seen, were given long before the passing of that act, and will therefore only be of use rather on analogy than as a direct authority. The king of Sweden having subdued and being in the possession of the whole dukedom of Courland, and doing acts of sovereignty, some tar of the growth of that country was imported in a Swedish-built ship, and Sir Edward Northey was of opinion that it was illegal. The opinion of the custom-house seems to have been formed, partly from the idea that the same sovereignty constituted the same country, without regard to its having been so at the time of the passing of the navigation act, and partly with an eye to the local situation and the geography of the places. But all possible doubt on this head is now entirely removed, by the enactment of the statute 27 Geo. 3. c. 19. (2)

Bullion and prize goods, and all other goods, of the growth, production, or manufacture of Europe, not prohibited to be imported, or regulated as already stated, may be imported from any place in foreign ships owned and navigated in any sort of manner; but if in *British* ships, they must be navigated with a master and three-fourths of the mariners British subjects. (3)

III. British trade with Asia, Africa, and America. (4)

3dly. The trade of this country with *Asia*, *Africa*, and the greatest part of *America*, is still more strict and exclusive than the European trade. On this subject the *third section* of the great navigation act (5) provides; "That no goods or commodities of the growth, production, or manufacture of Africa, Asia, or America, or which are described or laid down in the usual maps

(1) See 27 Geo. 3. c. 19. ante. 179, 180.

(2) Ante. 179.

(3) 12 Car. 2. c. 18. s. 15. 34 Geo. 3. c. 68. Reeves, 2d ed. 504.

(4) See in general Bac. Ab. Merchant, N. 1. Com. Dig. Navigation. Reeves, 2d ed. 498—501.

(5) 12 Car. 2. c. 18. See the summary, Reeves, 2d ed. 498, 9.

or charts (1) of those places, shall be imported into England, Ireland, or Wales, islands of Guernsey and Jersey, or town of Berwick-upon-Tweed, in any vessel but in such as do truly and without fraud belong only to the people of England or Ireland, dominion of Wales, or town of Berwick-upon-Tweed; or of the lands, islands, plantations, or territories in Asia, Africa, or America, to his Majesty belonging, as the proprietors and right owners thereof (2); and whereof the master and three-fourths at least of the mariners are English; under the penalty of the forfeiture of all such goods and commodities, and of the ship or vessel in which they were imported, with all her guns, tackle, furniture, ammunition, and apparel, one moiety to the king, and the other to the informer."

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The trade with these quarters of the world is still further restrained by the *fourth section* of the act, which enacts " that no goods or commodities that are of foreign growth, production, or manufacture, and which are to be brought into England, Ireland, Wales, the islands of Guernsey and Jersey, or town of Berwick-upon-Tweed, in English-built shipping, or other shipping belonging to some of the places before mentioned in this act, shall be shipped or brought from any other place or country, but only from those of the said growth, production, or manufacture, or from those ports or places where the said goods and commodities can only or are or *usually* have been (3) first shipped for transportation, and from none other places or countries, under the penalty of the forfeiture of the goods imported from such places, and of the ship with her tackle," &c. This section, says Mr. Reeves (4), is an appendage to the first and third sections, and applies equally to one as the other, it relating to the plantation trade, and the trade of Asia, Africa, and America. It is thus provided by those two sections, that the trade shall be carried on in English-built ships, *directly* with the very countries of which the goods are the produce.

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(1) The word used in the act is "*cards*," printed by mistake for charts, the word used in the other sections.

(2) By 26 Geo. 3. c. 60. s. 1. the ship must now be British-built. Reeves, 2d ed. 499. But there is an exception in favor of goods of the growth of the United States imported in ships belonging to such states, by 37 Geo. 3. c. 97; Reeves, 2d ed. 499.: and East India goods in foreign ships, if allowed by the king in council, under 35 Geo. 3. c. 115. Reeves, 2d ed. 499.

(3) Reeves, 2d ed. 499. See Construction, ante, 176. n. 4.

(4) Reeves, 1st ed. 140. 2d ed. 107. 500.

III. British Trade with Asia, Africa, and America.

To these regulations it was thought expedient to subjoin provisoes in favour of certain particular trades; and we see that by the 12th section of this statute it is provided, "that the act shall not extend to restrain or prohibit the importation of any of the commodities of the Streights or Levant seas, loaden in English-built shipping, and whereof the master and three-fourths of the mariners at least are English, from the *usual* ports or places for lading them heretofore within the said Streights or Levant seas, though the said commodities be not of the very growth of the said places," and Trieste, Venice, Genoa, and Leghorn, are now considered as ports which by usage are entitled to this privilege for the export of Asiatic goods from the Levant (1): and by a recent statute this exception has been extended to the island of Malta and the dependencies thereof (2). But this 12th section in the 12 Car. 2. has been partially repealed by the statute 6 Geo. 1. c. 24. which prohibits the importation of raw silk or mohair yarn, the production or manufacture of Asia, from any port in the Streights or Levant seas within the dominions of the Grand Seignior. An exception was also made in the 13th section (3) in favour of the East Indies; and by which it is provided, that that act should not extend to restrain the importation of any East India commodities, loaden in English-built shipping, and whereof the master and three-fourths of the mariners at least are English, from the usual places of lading them in any part of those seas to the southward and eastward of the Cape of Good Hope, although the said ports be not the very places of their growth. There are besides some other regulations collected in Mr. Pope's Law of the Customs and Excise, and in the Statute Book, relative to the trade of this country to the East Indies and the Cape of Good Hope (4). And it is further provided by the 14th section, that it should be lawful for any of the people of England, Ireland, or islands of Guernsey or Jersey, in vessels to them belonging, and whereof the master and three-fourths of the mariners at least are English, to load and bring in from any of the ports of Spain or Portugal or Western Islands, commonly called Azores, or Madeira or Canary Islands, all sorts of goods or commodities of the growth, production, or

(1) 12 Car. 2. c. 18. s. 12. Reeves, 2d ed. 108—500, 1. where see the exceptions enumerated.

(2) 55 Geo. 3. c. 29. s. 10.

(3) 12 Car. 2. c. 18. s. 13.

(4) See Pope's Law of Customs and Excise, 83. 86. titles East Indies and Cape of Good Hope.

manufacture of the plantations or dominions, or of either of them respectively. (1)

III. British Trade with Asia, Africa, and America.

These provisions constitute the principal features of the navigation act, and the rules by which this part of our commerce with Asia, Africa, and America, is governed. These provisions have in subsequent times been drawn closer or relaxed, as the policy of the times seemed to require. Very early in the reign of William the third, our silk manufactures began to flourish; and as under the act of navigation *thrown silk* of foreign manufacture might be imported into this country, in order to encourage this new kind of manufacture in England, the statute 2 W. & M. st. 1. c. 9. s. 2. enacts, that no *thrown silk* of the growth or production of Turkey, Persia, the East Indies or China, or of any other country or place (except that of the growth of Italy, Sicily, or the kingdom of Naples, and which shall be imported in such ships and so navigated as directed by the act of navigation, and brought from some of the ports of those countries or places whereof it is the growth or production, and shall come directly by sea, and not otherwise (2),) shall be imported into England, Wales, Guernsey, Jersey, or the town of Berwick, on pain of forfeiting such thrown silk. And we have seen that raw silk and mohair yarn, the production of Asia, is prohibited to be imported otherwise than direct from Asia. (3)

The strictness of the navigation act was some time afterwards relaxed in favour of some articles that it was considered necessary to procure, or which appeared to be of no great consequence in regard to general commerce (4); and accordingly, by 7 Anne, c. 8., permission was given to import from any of the British plantations in America, certain drugs therein enumerated, and all drugs the growth and production of America, in ships regularly manned and navigated, on paying the like duty as if they came *directly* from the place of their growth: which regulation operated as a repeal (except as to Jesuits' bark) of the clause in the book of rates on this head (5), and as an encouragement of the trade between

(1) This permission was extended in the war of 1744 by the statute 17 Geo. 2. c. 36.

(2) Ante, 181, 2. It appears that this exception is of no avail, there being no provision of the kind in the act of navigation, as here expressed.

(3) 6 Geo. 1. c. 14. ante, 194.

(4) Reeves, 2d ed. 110.

(5) Reeves, 2d ed. 111.

III. British Trade with Asia, Africa, and America.

our colonies and the Spanish settlements. And again, in order to obtain articles so necessary for our manufactories as cochineal and indigo at a cheap rate, these two commodities were allowed for a certain time to be imported from any port or place duty free, in British or other ships in amity with England, by statutes 13 Geo. 1. c. 15. and 7 Geo. 2. c. 18.; and which, though temporary, have been continued from time to time; and lastly, by statute 57 Geo. 3. c. 23., are continued until the 25th March 1820: but the general permission given by these acts is restrained by the act 46 Geo. 3. c. 29., which took out of their operation the territories of the East India Company. A new course of trade had brought the silks and other commodities of Persia through the Russian dominions; but as this appeared to be in direct contravention of the act of navigation, and the trade was considered as lucrative and advantageous, it was thought advisable to permit the same by a special act of parliament. This was done by stat. 14 Geo. 2. c. 36., which permits any person free of the Russian company, in exclusion of all others, to import into this kingdom, in British-built shipping navigated according to law, from any port or place belonging to the czar of Russia, *raw silk*, and other commodities of the growth, production, or manufacture of Persia (provided such manufacture be made of the growth or produce of Persia), being purchased by barter with woollen or other manufactures, goods or commodities, exported from Great Britain to Russia, *and from thence carried into Persia* (gold and silver coin or bullion excepted), or with the produce arising from the sale of such manufactures, &c. The second section imposes an oath on the importer that such silk was bought by barter of the commodities, as in the first section specified. It will be seen, on referring to the first section, that the English merchant was enjoined not to stop and barter his commodities with the subjects of Russia, but to go through the emperor's dominions to the first market, and barter them with the Persians themselves, and thus obtain the commodities of Persia at a cheaper rate than he could if bartered with the Russian merchant; but this provision was not of long duration, for the politic czar soon saw the reason of this requisition; and fairly concluding that the English government, sooner than give up so lucrative a trade as this proved to be, would concede a small point to him, prohibited the transportation of such commodities through his dominions into Persia, and thus for a while put an end to the trade. The czar however was not wrong, for by the statute 23 Geo. 2. c. 34., the enactment respecting the carrying of the

commodities of barter to Persia was no longer required, and English merchants were permitted to barter with the Russian subjects for the goods of the produce of the Persian empire. This was the only alteration made by the new act, except that which was a consequence of it, viz. the form of the oath on importation (1). The importation of *gum senega* being about the year 1752 much decreased, and at the same time the printing of silks, calicoes, and cottons being much improved, in order to encourage the importation of this article, so necessary in those trades, and because under the provisions of the act of navigation it could not be imported from any place but the place of its growth, the stat. 25 Geo. 2. c. 32., reciting the above reasons, permits the importation of gum senega from any port in Europe, in British-built ships navigated according to law. *Cotton wool* is another article which forms an exception to the law of this part of our trade, which may be imported in British-built ships from any port or place; and the same privilege is extended to *goat skins*, raw or undressed, by the temporary act of 15 Geo. 3. c. 35., which was made perpetual by 31 Geo. 3. c. 35. Several other regulations have been made by parliament to govern the trade with Asia, Africa, and America; and among these, those acts that give an exclusive right of trade with certain places to some chartered companies, which we will defer considering until a subsequent chapter.

III. British Trade with Asia, Africa, and America.

The commercial intercourse with the *East Indies* was opened to America by 37 Geo. 3. (2) and has recently been materially altered; and private traders under certain restrictions may now carry on traffic with those territories, though the monopoly of the trade to China is still secured to the East India Company, for twenty years from the 10th April 1814 (3). The 57 Geo. 3. c. 95. sect. 1. enacts, that nothing contained in the navigation acts, or in any other act passed for the like purposes, shall extend to or in any way affect the importation or exportation by the East India Company, or by any other of his Majesty's subjects, in British registered vessels navigated according to law, or in vessels registered or trading under the provisions of 55 Geo. 3. c. 116., of any goods at, into, or from any place within the limits of the charter of the said company, or to affect the importation or ex-

(1) See Pope, Law of Customs, title 62, rule 5.

(2) Reeves, 2d ed. 322, 3.

(3) 53 Geo. 3. c. 155. 54 Geo. 3. c. 34. 57 Geo. 3. c. 95. 4 Adolphus, 560—563.

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portation at, into, or from any place whatever, in such vessels as aforesaid, of any goods of the growth, produce, or manufacture of any place within the limits aforesaid, or to require that any bond for the exportation or importation of goods in any particular manner shall be given, in respect of any such vessels bound to or from any place situated within the limits aforesaid. The regulations respecting the trade with the East Indies are very ably collected in Mr. Pope's Laws of Customs and Excise (1), and will in a future chapter be further considered, when we examine the privileges of particular companies. (2)

It appears that some doubts were entertained whether the goods enumerated in the third and fourth sections of the statute might not, if carried from the place of growth or production into any foreign parts of Europe, be *manufactured there*, and be imported from thence into this kingdom; but to remove these doubts the 19 Geo. 3. c. 48. was passed; which, after reciting the nature of them, and that if such importation was allowed it would be very prejudicial to the country and ruinous to its different artificers and labourers, enacts, that the 12 Car. 2. c. 18. shall not be construed to extend to permit any goods or commodities of the growth or production of Africa, Asia, or America, which should be in *any degree* manufactured in foreign parts, to be imported or brought into the kingdom of Great Britain, Ireland, or the islands of Guernsey, Jersey, or Man; except and unless the same shall be manufactured in the country or place in which the said goods and commodities are the growth and production, or in the place where such goods and commodities can only be or (3) are first shipped for transportation, and from no other place whatsoever, under the penalties and forfeitures in the said act mentioned (4): but by sect. 2. of that act it was provided, that it should not restrain or prohibit the importation of oil of cloves, oil of cinnamon, oil of mace, and oil of nutmegs, or of any goods or commodities which are permitted to be imported into this kingdom under particular circumstances and restrictions by any *subsequent* acts (meaning acts subsequent to the 12 Car. 2. c. 18.) of parliament which were then in force. The occasion of this act was a decision in

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(1) 4th ed. title 86.

(2) Post.

(3) It is to be observed that the word "usually" adopted in this place, in 12 Car. 2. c. 18. s. 8 and 4. ante, 176. 193. is omitted in this act.

(4) 12 Car. 2. c. 18. s. 3.

the court of Exchequer, allowing such manufactured articles to be imported.

III. British Trade with Asia, Africa, and America.

The *African* trade has undergone some modification since the peace of 1783; for the stat 27 Geo. 3. c. 19. sect. 11. makes it lawful for any person to import or bring into Great Britain from *Gibraltar*, in any ship or vessel which before 1 May 1786 did truly and without fraud belong wholly to His Majesty's dominions, or are of the built thereof, and navigated and registered according to law, any goods, wares, or merchandize being the growth or production of the dominions of the emperor of Morocco, and which shall have been imported into Gibraltar directly from any of those dominions not lying southward of the port of Mogadore, in ships or vessels belonging to or of the built aforesaid, navigated and registered as aforesaid, or ships belonging to the subjects of the emperor of Morocco, upon payment of the same duties as if they came from Africa; but by the second section the goods must have a certificate from the governor of Gibraltar, showing that they came from thence in the above manner (1). This act is framed in such a manner that the important provisions of it may be easily overlooked, from the circumstance that they treat of so many different subjects: Irish shipping, the fisheries, European and African trade, are all in some way concerned. *Ireland* now again began to claim the attention of the legislature; some acts (2) of parliament had already imparted to that kingdom many of the trading privileges that belonged only to Great Britain, by the repealing so much of divers acts that prohibit the exportation of certain articles there named from the kingdom of Ireland into foreign parts; and it being still unlawful to import into England from Ireland any goods of the growth of our colonies in Asia, Africa, and America, which under the statute 20 Geo. 3. c. 10. had been imported into Ireland, it was thought advisable to permit it, which was accordingly done by the statute 33 Geo. 3. c. 63. which provides that any of those commodities legally imported into Ireland may be imported into England in English or Irish-built ships; but the act was not to extend to curtail the privileges of the East India company; and at length by the act of union the subjects of Ireland have the same privileges as British subjects. (3)

(1) Reeves, 2d ed. 342.

(2) 20 Geo. 3. c. 6. 20 Geo. 3. c. 10.

(3) 39 and 40 Geo. 3. c. 67, article 6.

III. British Trade with Asia, Africa, and America.

A very material alteration was made in the year 1795 in the *East India* trade. At a time when a very great part of the English shipping was employed by the government to carry on the war in 1803, the court of directors of the *East India company*, under the sanction of the board of commissioners for the affairs of India, sent out advices to their presidencies to take up such ships as they could procure, and to send home investments from India and China and other places within their limits, and not to wait till English-built vessels arrived from Great Britain. This order of the court of directors was deemed a fit subject for an act of parliament; and it was therefore enacted by the stat. 35 Geo. 3. c. 115., that if any ships, during the continuance of the war, should arrive in the ports of this kingdom freighted with goods from any of the ports in the limits of the company, it should be lawful, upon representation made by or on the behalf of the said company to his Majesty in council, for his Majesty, by and with the advice of his privy council, to authorize the importation and entry of the goods as if they were imported in British-built ships, navigated and registered according to law though the said ships might not be British-built, nor navigated or registered according to law, provided they were of the built of the territories belonging to the said United Company, or of ports under the protection of the British flag in the East Indies, and suffer such ships to export from this kingdom to the British settlements in the East Indies, with the licence of the company, any goods, save ordnance and military stores. This act of parliament, which thus infringed upon the wise and politic enactments of the act of navigation, was only to continue during the war; but in less than six years afterwards, by the stat. 42 Geo. 3. c. 20., its provisions, for what reasons we are not told, were to continue in force till the charter of the East India company expired.

With respect to the trade with the *United States of America* and this country, it is principally regulated by the treaty of commerce of the 3d of July 1815, and the 56 Geo. 3. c. 15. s. 1. which confirms it (1). These states having formerly been under the dominion of the king of England, and their commercial rights of prosecuting trade here having secured to them some privileges which are enjoyed only in general by the inhabitants

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(1) See the treaty and act, post, last volume, and Pope's Law of Customs, title 136. Reeves, 2d ed. 314, 5.

of the British colonies, we will defer speaking of them till we consider the law of the colonial or plantation trade.

III. British Trade with Asia, Africa, and America.

Decisions and opinions on regulations respecting trade with Asia, Africa, and America.

It seems to have been formerly the received opinion, that from its general wording, the 4th section of the 12 Car. 2. c. 18. prohibited the importation of *all foreign goods* whatsoever; but it is now understood to be confined solely to the particular goods and commodities of Asia, Africa, and America (1). The misconception of the meaning of this clause seems to have arisen from the erroneous views which were then taken of the policy of this law, which certainly was to make this country, as much as possible, the *depot* of every commodity in the world, and to constitute England the general emporium of commerce. With this idea, the legislators of those days having made provisions apparently equitable in the main to the other independent states of Europe, and with due deference to their power to make similar enactments, did not think it prudent totally to exclude European shipping from the British ports: but the same reasons not at that time prevailing in the other quarters of the globe, the parliament of that day determined to shut the British ports to the ships of Asia, Africa, and America altogether; and accordingly the third and fourth sections of this act were then added. To close the *English* ports *only* to Asiatic, African, or American shipping, and at the same time leave those of its colonies entirely open, would evidently have left this object but half finished; and therefore, in order to prevent such shipping from carrying on an indirect trade with England by means of her colonies or those of any other state, the fourth section forbids any importation into England of *any* goods the growth, production, or manufacture of Asia, Africa, and America, except from the country of production, and then only in British-built shipping, or shipping of the built of the British colonies.

Shortly after the passing of the act of 12 Car. 2. c. 18. sec. 4. an information was filed for importing Malaga wine in a ship not English nor English navigated; it was objected that the fourth section was confined to the products of Asia, Africa, and America; and Chief Baron Hale said that the subsequent sections might include Europe in some particular cases, but not in the case now before us; plainly intimating that this section did not apply to the European trade, and that the clauses which did

(1) Reeves, 1st ed. 159. 2d ed. 121.

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apply to the European trade did not make this a cause of forfeiture (1). But notwithstanding this decision, the custom-house still continued to entertain the opinion that the fourth section applied to Europe; and on the occasion of the importation of some hemp from Holland, in an English ship legally owned and navigated (but Holland was not the place of growth, nor was it the growth of Muscovy or Russia, but of Germany; nor was it an article enumerated as being forbidden in the act of frauds (2),) stated the case for the opinion of Sir Robert Sawyer, who declared the hemp to have been legally imported, as not being within the clause that forbids goods being imported from any other place than that of their growth: and Mr. Warde, on a like occasion, gave a corresponding opinion, as also did Mr. Somers. These opinions it seems did not satisfy the officers of the customs, and in 1702 Sir Edward Northey, in two instances, positively and clearly declared that the fourth clause of the act of navigation did not extend to European merchandize.

Some points of difficulty have arisen upon the words "*growth, production, or manufacture*," used in the first, third, and fourth sections of the above act. Some sugar, the production of the French colonies, had been imported into France and there refined; the molasses of those sugars was from thence imported into England: the question was, whether this was a legal importation, and whether this refining of the sugar in France took them out of the operation of the act; though had it been done in Asia, Africa, or America, they clearly were. Mr. Warde, Mr. Powis, and Mr. Roger North, thought that it was illegal. The two former gentlemen do not seem to have entered on the case at any length; but the opinion of the latter gentleman, together with his reasoning, are deserving of attention, inasmuch as they may form a just and accurate criterion to which importations of a similar nature might be referred, and the difficulty solved with ease. *Mr. Roger North* (3) submitted the following considerations: First, goods of the growth of the Indies, manufactured in France, might be brought from thence, as wrought silks, cabinets, and other articles; secondly, if in working of such articles and manufacturing them there was a refuse or waste, such refuse or waste could not be imported, notwithstanding the labour of man had been bestowed to sever it from the original

(1) Witherin v. Robinson, Hardres, 487. Reeves, 2d ed. 121.

(2) 13 & 14 Car. 2. c. 11.

(3) Reeves, 2d ed. 125.

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commodity; thirdly, if a plain separation was made without any manufacture at all, the case was more clear, as the *garble* or sifting of spice, though severed by man's labour and had a new name, yet it was still, in the sense of the act, the *production* of the spice country and not the *manufacture* of the place where sifted. We will not follow the learned gentleman through his application of the case of the molasses to the above considerations, because they are already so plain and so abundantly obvious as to need no explanation or example. However, upon a question whether calicoes imported from the East Indies to this country, and from hence to Holland, could be reimported into England after being painted and stained in imitation of chintz? Mr. Trevor was of opinion that they could not be reimported (1). There are, however, some instances of articles originally the production of Asia, Africa, or America, but imported into some foreign part of Europe and really and bonâ fide manufactured there, that may be introduced into this country as a manufacture of the European state: thus vermillion is a manufacture of quicksilver, made by a chemical process; and this article was admitted by the custom-house from Holland, as coming directly from the *place of its manufacture*, though quicksilver was the growth of the East Indies. *Mr. Wallace*, the then Attorney General, gave his opinion that it was admissible, though it seems on the ground of usage; but Mr. Reeves (2) says the article must have at first been admitted on the ground that it was completely a manufactured article; and on referring this case to the before-mentioned observations of Mr. Roger North, it will be found to be agreeable to the strict letter of them. This question concerning the manufacturing in Europe of goods the production of Asia, Africa, or America, was brought to a conclusion by a decision of the court of exchequer, in the 18th year of the reign of George the third (3). Some ostrich feathers, of African produce, were brought to France and there dressed, and from thence imported into this kingdom: this manufacturing in France appeared to the court to be such as to justify the importation under the act of navigation; but we have seen that by a provision in an act of the present reign this kind of importation was prohibited. (4)

That part of the fourth section which speaks of *direct* im-

(1) Reeves, 2d ed. 127.
(2) Reeves, 2d ed. 128.
(3) Reeves, 2d ed. 129.
(4) See ante, 197, 8. 19 Geo. 3. c. 48.

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portation under the words "shall not be shipped or brought from any place or country, but only those of the growth, production, or manufacture," &c. have likewise been productive of some discussion. A drug, the production of the Turkish dominions in Asia, was imported from Leghorn in an English-built ship, and was alleged to have been brought to Leghorn in another English ship; this case likewise turned upon a clause in the book of rates, which gives a reduction of two-thirds in the duty on all drugs imported *directly* from the place of growth in English-built ships. On the latter point it was the opinion of Mr. Warde, that this was not a *direct* shipping from the place of their growth, and within the meaning of the clause in the book of rates. Upon the other point he thought, that though if an English ship had fetched these articles direct from the place of growth, and meeting with some accident on the voyage, was compelled to re-ship them into another English vessel, that the importation in the last vessel would be legal; yet where the voyage was broken, as in the present case, by the landing at Leghorn, an importation after such landing was contrary to the meaning and intent of the navigation act. But the same case being laid before Mr. Saunders, he thought the importation was legal, because in his opinion if an English ship had been employed to fetch the commodity from the place of its growth, and afterwards landed it again in foreign parts, from whence it was again shipped on board another English ship, and landed a second time in foreign parts, and from thence imported in an English vessel to this country, the number of voyages made no sort of difference, the act meaning to encourage English shipping, though he said it was certainly beyond the letter of the act (1); but Sir Robert Sawyer, before whom the same statement was laid, was of opinion that the direct importation meant *one continued voyage*; yet where deviation by stress of weather or other necessity occurred, this deviation was not to be construed as breaking the continuance of the voyage. Yet upon another occasion, where a parcel of hard soap bought in Turkey, the place of its production or manufacture, was carried in English shipping to Hamburgh, and from thence to England, they both held this importation to be legal (2); so that we may presume that the former opinion was entirely founded on the clause in the book of rates; and accordingly both these opinions have been adhered to on subsequent occasions. Thus drugs of the

(1) Reeves, 2d ed. 130. (2) Reeves, 2d ed. 133.

growth of Barbary were shipped there in an English-built ship bound for London, but which in her voyage was to touch at Lisbon. On her arrival there she was found to be very leaky, and the drugs were there put directly out of that ship, landed, and afterwards put on board another English vessel, and this was held by sir Edward Northey to be a direct importation from Barbary (1). And again, in a case where bear skins were brought in a British ship from Newfoundland to Gibraltar, and there re-shipped on board another English vessel and brought to England, it was held by Mr. Willes that the ship and goods were not forfeited by the 13 & 14 Car. 2. c. 18. s. 4., but that they were forfeited by the 8 Geo. 1. c. 15. s. 25. Barbary copper is, by the practice of the custom-house, admitted to an entry, though it was imported first into Gibraltar and from thence to this country; in this case it was doubted whether, upon the re-export of the copper, the drawback should be allowed; but Mr. Willes was of opinion that the drawback must be allowed after the entry, though there might be some doubt whether the copper ought to have been admitted as coming from Barbary direct (2). In like manner train oil of Newfoundland might, according to Sir Dudley Ryder, be imported from Guernsey here without inducing a forfeiture. A singular case of navigation happened respecting the article senna, which is of the growth of Egypt, and is farmed and purchased there entirely by the Jews, Dutch, French, and Italians. The English, being thus wholly excluded from the purchase of it in Turkey, could not procure it but through some one of the above-mentioned countries. A quantity of senna bought in Holland was carried from thence to Smyrna in a British ship, landed and again shipped and imported into London. Upon this case two questions arose; first, whether this article being carried from Holland could be imported at all under the act of navigation; secondly, whether, if it could, this was to be deemed a direct importation from the place of its growth, so as to entitle the merchant to enter it on the single duty. To this it was answered by Mr. Thurlow, that the landing of the goods at Smyrna only to re-ship them weighed very little in his judgment: he rather thought the true meaning of the act of navigation was to force the English trader, as far as regulation could force it, into the first market, and to give it that very establishment which the merchants alleged to be in the possession of the Dutch and others; and that to effect this, the very

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(1) Reeves, 2d ed. 134. (2) Reeves, 2d ed. 135.

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large terms of prohibition, *no goods shall be shipped or brought, &c.* mean to exclude *all* shipping or carriage of such goods whatever, which was not from the place of their growth (1). And upon the whole we may conclude that it is not sufficient that the whole voyage be performed in a British ship, but it must be the same ship, except in such instances where necessity has compelled the change for the safety of the commodity.

The following words of the fourth section of the act of navigation, "*the ports where goods can only or are or usually have been first shipped for transportation,*" have given occasion to some question and debate. Cocoa-nuts of the growth of some foreign plantations in America, belonging to Spain or France, were at the time of the making the act of navigation, and after to the present time, brought from our plantations. Sir Edward Northey was of opinion, that they might be so imported, having been so usually there first shipped for transportation: Sir Constantine Phipps and Mr. Turner were of a different opinion (2). But this, after all, is a question of fact: and therefore, when a doubt respecting a like importation from Curassoa was submitted to Sir Philip Yorke, he put it upon that circumstance—*if* they were the places where they were usually first shipped: but it may be observed, that Curassoa, or any of the islands in the West Indies, could not be the places for the first shipping for transportation from the Spanish continent, unless that transportation was to signify nothing less than passing the Atlantic ocean to Europe (3). This reference to fact and usage was made on a like question as to the importation from our plantations of tobacco, the growth of the Spanish colonies. For better clearing up this point, a report of the general usage of the custom-house was directed to be made and laid before the law officers: by this report it was found, that it had been the practice for many years to admit drugs of the Spanish West Indies to be imported from our plantations, paying duty as imported from places *not* of their growth, and which usage was declared by the 7 Ann. c. 8. to be law; and a further privilege was thereby allowed (4). It was also found to be the practice to admit log-wood, cocoa, and some other commodities of the Spanish West Indies, to be imported by the way of our plantations; but the report did not refer to any other act of parliament

(1) Reeves, 2d ed. 138.
(2) Reeves, 2d ed. 139.
(3) Reeves, 2d ed. 139.
(4) Ante, 195.

that favoured such importation; and there appeared to them no particular reason why Spanish tobacco might not come in the same way. It appeared that cochineal, logwood, Nicaragua wood, indigo, Jesuits' bark, and snuff of the Havannah, were constantly allowed to be imported from our West India islands; and there were some instances of tobacco of the Brazils; but there had been no instance of bringing Spanish tobacco from any British plantation. Upon these facts Sir Philip Yorke was clearly of opinion that it could not be imported consistently with the act of navigation (1). But a practice seems since to have obtained, which makes it no longer necessary to inquire for the usual port for shipping in America, the whole continent and islands being considered as one place. In all the regulations that have been made since 1783 for adjusting the intercourse between our colonies and the United States, the principal view was to protect the navigation of this country: the people of the United States were accordingly prohibited from coming by sea to our colonies; but, in the mean time, an intercourse with Canada was kept up by an interior communication through the lakes, and many articles of the produce of the countries of the United States found their way into the province of Quebec, and were from thence transported to Great Britain. A doubt was stated, whether this importation was legal; and the opinion of the law officers being requested, they desired that the practice might be stated, as to the considering of *British and foreign America* one place or not, in respect to the importation of its produce: accordingly, the collector and comptroller of the port of London certified that it was an established rule to consider the whole of America, in respect to the importation of its produce into this kingdom, as one place; and in that view, that all articles, the growth of America, have been admitted in British ships from any part of that country, without regard to the goods being the production of British or foreign America, or to the port from which they were imported being the nearest to the place of their growth, or the usual port for shipping those goods. Upon which the law officers declared, that the importation of the produce of the United States having been lawful before their separation from Great Britain, must continue to be so, notwithstanding that separation, unless prohibited by some law made upon the separation or afterwards; and this opinion of the law officers was afterwards sanctioned by

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(1) Reeves, 2d ed. 140.

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the 30 Geo. 3. c. 29. s. 2. It appears that this practice prevailed so far back as 1756. (1)

A practice had also obtained in the custom-house of allowing the commodities of Asia, Africa, or America, when once imported, and afterwards exported to some European country, *to be again imported from thence.* The first instance of returned goods of this description was, where goods had been imported and paid the duty, and were exported (after having the drawback allowed) within the time limited by the second rule of the book of rates; but not finding a market, they were returned. On this point, on the subject of duties, sir Robert Sawyer held, they were, upon such second importation, liable to pay the same duties as upon the first importation, such reimportation being considered in law as an entire new importation; on the other head, the illegality of the importation, he held, that returned goods would not be forfeited within the fourth section of the act of navigation; however, he thought the 23d clause in the act of frauds, stat. 13 & 14 Car. 2. c. 11., extended the act of navigation to take away all pretence of returned goods of the kinds enumerated in that act. But Mr. Warde and sir John Somers thought the act of frauds applied only to the original importation, and if the goods had been originally imported from the proper place, the end of the law seemed to them to be answered. Accordingly it became a settled practice to allow the importation of such returned goods, but it was expected that they should be imported by the same person who exported them (2). In a case where A., a merchant in London, exported opium to Holland, and B., another merchant in London, ordered his factor to buy it there; sir John Somers said, that if the act was taken strictly, the exporter, A., might not afterwards return the goods to England; but by a reasonable equity in construing the act for the benefit of trade, it had been allowed to the person exporting to return them into England, if he did not find an opportunity to dispose of them in a foreign market: and though it might not seem to be equally reasonable to extend the construction so far as this case (where the exporter had had the benefit of a foreign market), because if allowed after an alteration of possession and property, it might be made the means to elude the act; yet if the practice at the custom-house, from the making of the act, had been to allow such importation upon oath made

(1) Reeves, 2d ed. 141. (2) Reeves, 2d ed. 144.

that the goods were the same, as he had been informed they did, he did not see but the law might be so understood and pursued accordingly. And when this practice was laid before sir Edward Northey, he held it proper to be followed, because it had been so invarible; provided the goods returned were the same goods, and had undergone no alteration of property. Sir Philip Yorke was of the same opinion, but said, if the point had stood alone on the act of navigation, without usage, the importation could not have been allowed (1). On a subsequent occasion Sir Philip Yorke was again called upon to deliver his opinion, when he said, he thought such returned goods were in strictness not liable to the payment of any duty, nor enterable, but they were forfeited for being relanded after exportation and the duties drawn back; he said he did not remember any act of parliament for the indulgence that had been allowed (2). The next year the succeeding attorney general, Mr. Willes, was consulted upon this point: it was where sugars had been exported on account of a foreigner, and re-imported by an English merchant; so that the property had evidently been altered. He thought, though the alteration of the property and possession might give greater opportunity to persons to commit frauds, and therefore, in such cases, there ought to be a stricter examination into the identity of the goods returned; yet if there was a full and clear proof that they were the same goods as were exported, he could not see what difference in reason the alteration in the property and possession could make; however, as the practice of admitting entries of returned goods had, ever since the opinion of Sir Edward Northey (3), been confined to such goods only where there had been no alteration of the property and possession, he thought they might very well proceed to take the opinion of the Court upon the case which was then depending. Upon another occasion however, where there was a change of property, he gave his opinion, that if the identity of the goods could be made out, an entry ought not to be refused. And upon the general point of admitting returned goods, he said, he was confirmed in opinion that it was right, by the constant practice, by the

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(1) Reeves, 2d ed. 145, 6. This seems, from an opinion of his Majesty's law officers of A. D. 1815, to be the settled law, except as to tea. See Pope, title 1. rule 4. n. b. Id. title 245. rule 2. n. c. and title 184. post 210.

(2) Reeves, 2d ed. 167.

(3) Supra.

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opinions of former attorneys general, and by the judgment of the then Chief Justice Eyre.

This practice, however, as far as regards tea, was stopped by statute 11 Geo. 1. c. 30. s. 8., which complains, that tea imported into Flanders and Holland from the East Indies used to be imported into this kingdom on pretence, that it had been formerly exported from hence; and to prevent such abuses in future, it enacts, that no tea shall be imported but from the place of its growth, although it may have been formerly exported from hence (1). In other respects the practice seems to have been fully established; and by order of the board of customs, dated 5th July 1815, it is stated, that His Majesty's law officers were of opinion, that returned goods, except tea, might be *re-imported* into this country, though not coming upon such re-importation from the place of their growth, when it is ascertained that such goods had been previously exported from this country; and goods so re-imported may be *re-warehoused.* (2)

The following questions arose upon cases peculiarly circumstanced, and were founded upon a supposition that the general point was settled. Some sassafras was brought to the port of Cowes, but was not landed, it was only reported there for Lisbon, to which place it was carried, and then brought back. Sir Dudley Ryder (3) upon this occasion was of opinion that the practice with regard to goods originally duly imported, on the duties being paid or secured, was an indulgence justified only by long usage; and as there was no such usage in the present case, and it had not the same equitable reasons attending it, he thought the commissioners were not sufficiently warranted to admit these goods to an entry. On the other hand, where elephants' teeth had been carried into Ireland as a prize, and there condemned, and then shipped for Hamburgh, and brought back from thence, Sir Dudley Ryder was of opinion, that as these goods might have been imported here originally from Ireland, they stood upon the same footing as goods returned hither, and therefore might be admitted to an entry as such. (4)

(1) Reeves, 2d ed. 148. Pope on Customs, title 1. rule 4. n. b. and title 184.

(2) Pope's Customs, 2d ed. title 1. rule 4. note b.; and title 245. rule 2. note c.

(3) 25 April 1743. Reeves. 2d ed. 148.

(4) Reeves, 2d ed. 149.

4thly, Having thus considered the trade of England upon her own shores, and with the dominions of all other states in Europe, and with Asia, Africa, and America, we are next to examine the regulations affecting *the trade with the British colonies, plantations, and possessions.* And here we find, that it has long been the policy of every state in Europe, and particularly of Great Britain, to prevent other states from having any commercial intercourse with her colonies, plantations, or foreign possessions, and to confine the traffic therewith to the subjects and ships of the mother country, as the best means of increasing her naval strength and consequent means of defence (2); and though during war it has occasionally been found necessary to relax this rule, yet the general policy is to enforce it as much as practicable (3). The principal enactment on this subject, is the great navigation act, 12 Car. 2. c. 18. s. 1., which in express terms—"for the increase of shipping and encouragement of the navigation of this nation, wherein the wealth, safety, and strength of this kingdom is so much concerned," enacts, "that no goods or commodities whatsoever shall be *imported* into or *exported* out of any *lands, islands, plantations,* or *territories* to his Majesty belonging, or in his possession, or which may hereafter belong unto or be in the possession of his Majesty, his heirs and successors, in *Asia, Africa, or America,* in any other ship or ships, vessel or vessels whatsoever, but in such ships or vessels as do truly and without fraud belong only to the people of England or Ireland, dominion of Wales, or town of Berwick-upon-Tweed, or are of the *built of,* and *belonging* to any the said lands, islands, plantations, or territories, as the proprietors and right owners thereof, and whereof the master and three-fourths of the mariners, at least, are English; under the penalty of forfeiting the goods, and the ship or vessel, with all her guns, furniture, tackle, ammuni-

IV. Trade with British Colonies and Plantations, (1) and Territories abroad.

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(1) The plantations are colonies of the kingdom of England, which belong to the crown and kingdom, and are part of their dominion, and the inhabitants thereof are within the king's allegiance, and subject to the laws of England. See the Law of the Plantations in general, Com. Dig. Navigation, G.; 7 & 8 W. 3. c. 22. s. 9. And see the General Index to Statutes, title Plantations; and post.

(2) Marriott's Case of Dutch Ships, 4 ed. 15. Per Lord Ellenborough in Lubboch v. Potts, 7 East, 454. Sir Josiah Child on Trade, Preface. And see recital in 15 Car. 2. c. 7. s. 5.

(3) Reeves, 2d ed. 523. 4. Lord Sheffield's Strictures on the Necessity of inviolably preserving the Navigation and Colonial System of Great Britain. Collection of Reports, &c. on Navigation, ed. A. D. 1807. 3 Adolphus, 163—172.

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tion, and apparel; one-third to the king, one-third to the governor of the plantation where the default was committed, if the ship was seized there, and the other third to the informer: and further, all admirals and commanders of king's ships are authorized to seize the ship offending, and deliver her to the court of admiralty; and in case of condemnation, one moiety of the forfeiture goes to the admiral and his company, to be divided as in case of prizes, and the other to the king. And the second section enacts, that no alien, except such as are naturalized or made a free denizen, shall exercise the trade of a merchant or factor in any of the said places, under the forfeiture of all goods and chattels." This provision was levelled at the Dutch, who were at that time the chief factors or agents in our colonies (1). These great provisions were followed by numerous other statutes; and the existing regulations upon this branch of trade are very multifarious. We shall find it convenient to consider the subject under the following heads:—1*st*, By *defining* what are the British colonies, plantations, and possessions within the meaning of the above and other statutes on the subject: 2*dly*, The *ships* in which the trade with the colonies must be carried on, and the particular *ports* which are *free*: 3*dly*, The *goods* which *must* be imported *into Great Britain direct* from the colonies: 4*thly*, The *goods* that may be imported into certain parts of Europe: 5*thly*, The *European* goods that *must* be imported *into* the colonies direct from England, or from what other ports: and 6*thly*, The modes by which observance of these laws is enforced.

1st, Then, *What places are included under the terms, "lands, islands, plantations, or territories to his Majesty belonging, or in his possession, in Asia, Africa, or America," used in the statutes applicable to this subject?* All the British possessions in the East and West Indies, and all places in America under the protection of the British government and dependent upon it, are included in this description, and are therefore subject to the navigation laws, unless otherwise expressly provided. But where by certain provisions of some of the acts on this head leave is given to transport goods the produce of one "*plantation*" to another plantation, it is not to be understood that this extends to allow the importation of such commodities into the islands of Guernsey or Jersey, or Malta, or the fortress o

(1) 3 Adolphus, 164. ante, 148. Reeves, 2d ed. 301. n. a.

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Gibraltar, or any of the islands in the English channel. Thus, upon the term "plantations" in the navigation act, 12 Car. 2. c. 18. it was held that colonial produce cannot legally be shipped from the British West Indies for *Gibraltar*, because the term *plantation*, as used in the navigation laws, has never been applied to any of the British dominions in Europe, nor to Jersey, Guernsey, or any of the islands in the Channel. That term, in its common known signification, is applicable only to colonies abroad where things are grown, or which were settled for the purpose principally of raising produce, and have never in fact been applied to a place like Gibraltar, which is a mere fortress and garrison, incapable of raising produce, but supplied with it from other places (1). Under these provisions, a very important doubt arose, whether they extended to the British territories in the East Indies, a doubt which the East India company thought it expedient to keep alive, so as to leave the law of trade with these valuable possessions in such a state as to deter any person from risking the forfeitures attached in case even of an unintentional breach of them; some cases have been decided on this point, whereby it appears that under the words in the navigation act, 12 Car. 2. c. 18. "lands and territories to his Majesty belonging," these extensive dominions were decided to be within the scope of the navigation laws (2); but by a recent enactment in the 57 Geo. 3. c. 95. the territories within the limits of the company's charter are entirely excepted from the operation of these laws on navigation. Notwithstanding the authorities above alluded to, the preamble of this act recites, that the provisions of the navigation laws have been *commonly* supposed *not* to apply to these territories, and then enacts (sect. 1.) that nothing contained in the recited navigation acts, or in any other act passed for the like purposes, or any of them, shall extend or in any way affect the importation or exportation by the East India company, or by any other of his Majesty's subjects, in British registered vessels navigated according to law, or in vessels registered or trading under the act 55 Geo. 3. c. 116. of any goods, &c. at, into, or from any port or place within the limits of the charter of the said company, or to affect the importation or exportation at, into, or from any place whatsoever of any goods, &c. of the growth, produce, or manufacture of any place within the

(1) Lubboch v. Potts, 7 East, 449.

(2) Morck v. Abel, 3 Bos. & Pul. 35. Chalmers v. Abel, 3 B. & P. 604. Camden v. Anderson, 6 T. R. 723. 1 Bos. & Pul. 272. S. C. Wilson v. Marryat, 8 T. R. 31. Reeves, 2d ed. 322—337.

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limits aforesaid, in such vessels as aforesaid. But the proviso of the third section declares, that that act shall not be construed to extend to alter or affect the acts 53 Geo. 3. c. 155., 54 Geo. 3. c. 34., 55 Geo. 3. c. 116., and 57 Geo. 3. c. 36., or to affect any laws then in being relative to the trade of foreign nations in amity with his Majesty with the said British territories. The fourth section puts the settlement at the Cape of Good Hope within the company's limits. This settlement, when it first fell under the protection of the British government, was not suffered to rank with the colonies in general in respect to trade, but was placed under the special superintendance of the king, by a temporary statute, 37 Geo. 3. c. 19.; since this place was regained by capture to the British government during the late war, the 57 Geo. 3. c. 1. (1) was passed relating to the trade thereof, and which, after continuing the 49 Geo. 3. c. 17. and reciting that it is expedient under the present circumstances that the trade and commerce to and from all islands, colonies, or places, and the territories and dependencies thereof, to his Majesty belonging, or in his possession, in Africa or Asia, to the eastward of the Cape of Good Hope, excepting only the possessions of the East India company, should be regulated for a certain time in such manner as shall seem proper to his Majesty in council, notwithstanding the special provisions of any act or acts of parliament that may be construed to affect the same; it is therefore enacted, that it shall be lawful for his Majesty in council, by any order to be issued, from time to time, to give such directions and make such regulations touching the trade and commerce to and from the said islands, colonies, or places, and the territories and dependencies thereof, as to his Majesty in council shall appear most expedient and salutary; any thing contained in any act of parliament now in force relating to his Majesty's colonies and plantations, or any other law or custom to the contrary in any wise notwithstanding: this act is to be in force till 5th July 1820. (2)

2dly, We are to consider *in what ships and at what ports goods may be imported or exported to and from the colonies,*

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(1) Pope, title 83. rule 10. Cape of Good Hope.

(2) Several opinions upon what is to be considered a colony, plantation, or foreign possession to his Majesty belonging, or in his possession, within the meaning of the navigation act, and other laws relating to duties and merchandize, will be found collected in Reeves, 2d ed. 93—105. and 304—312.

&c. (1). We have seen (2) that the first and principal enactment upon this subject is the 12 Car. 2. c. 18. s. 1.; which in substance prohibited the import or export of goods into and from his Majesty's territories in Asia, Africa, or America, in any vessel not belonging to a subject of Great Britain or Ireland, or of the built of some such territory, and navigated by an English master and three-fourths English mariners. The act of the 7 & 8 W. 3. c. 22. went to restrain still more the trade with the colonies; for in the preamble it sets out by stating that great abuses were committed in this trade, to the prejudice of the English navigation, by ill-disposed persons; and then enacts, that no goods shall be imported into or exported out of any English colony in Asia, Africa, or America, or shall be laden or carried from one port of the colonies to another, or to the kingdom of England, dominion of Wales, or town of Berwick-upon-Tweed, in any ship but what is of the *built of England, Ireland, or of the said colonies or plantations*, and wholly owned by the people thereof, and navigated according to law, (except vessels taken as prize and properly condemned in one of the admiralty courts of England, Ireland, or the said colonies, navigated as aforesaid, and whereof the property does belong to *Englishmen*,) under the penalty of the forfeiture of the ship and goods, one-third part to the king, one-third to the governor of the colonies, and the other to the informer. This last enactment effected a considerable alteration in the law as declared by the statute of 12 Car. 2. c. 18.; by that act English-*owned* vessels were entitled to trade with the colonies, but which permission was thus taken away by this act of William III., and confined to English-*built* ships, or ships of the built of Ireland or the colonies, which has been further confirmed by the registry act (3) and the British mariner act. (4)

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These, then, are the principal regulations which form the fundamental system of our colonial trade; and though certainly they have been in after times considerably altered, yet these innovations on the system may be considered rather as exceptions and modifications of a general rule, than treated as positive enactments affecting the trade at large; on this account we shall here give the general summary of the law, and afterwards proceed to state the exceptions and modifications above alluded

(1) See division of subject, ante, 212.

(2) Ante, 211.

(3) 26 Geo. 3. c. 60. called Lord Hawkesbury's Act.

(4) 34 Geo. 3. c. 68.

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to. The general law on the subject of plantation trade that may be drawn from the foregoing provisions, and which is now in force, subject to the provisoes presently noticed, may be laid down in one general rule; viz. that no goods or commodities may be imported into or exported out of any colony, plantation, possession, or territory to his Majesty belonging, in Asia, Africa, or America, but in British or Plantation-built ships, British-owned, and navigated by a master and at least three-fourths of the mariners British subjects.

Process of time, however, has shewn that it was necessary for the welfare of the colonies in the West Indies, that they should not be thus restrained in their trade with other parts of the world; and therefore, in order to afford them a little more liberty, and at the same time not entirely to give up this favorite system of colonial trade, the legislature thought it expedient to constitute some of the principal ports of our colonial possessions *free ports* for the purpose of importation and exportation (1). The occasion that led to the passing of an act to establish free ports in the colonies, was the contraband trade that had always been carried on in the West Indies between the Spanish and English colonists; this was contrary to the laws of both nations, but as far as it related to ourselves, it had been connived at: it was however resolved to legalize this clandestine traffic, and to put it upon a footing of law; the best way of carrying this into execution, seemed to be by opening *particular* ports for the free importation and exportation of certain specified articles, which would otherwise have been forfeited under the navigation acts (2). The necessity for the establishment of some free ports had long been felt, and many provisions are to be found in the statute book on this head (3); these however for the most part were only experimental, but the beneficial effects arising from them were so obvious, that it was thought expedient to collect all the acts together, and in a new act to consolidate and extend all these ordinances; with this view the statute 45 Geo. 3. c. 57. commonly called the *free port act*, was passed. The first section of it declares, that wool, cotton wool, indigo, cochineal, drugs of all sorts, cocoa, logwood, fustic, and all sorts of wood for dyers use, hides, skins, and tallow, beaver, and all sorts of furs, tortoise shell, hard wood, or mill timber, mahogany, and all

(1) See Beawes, Lex Merc.
(2) Reeves, 2d ed. 82.
(3) 6 Geo. 3. c. 49. 14 Geo. 3. c. 41. 21 Geo. 3. c. 29. 27 Geo. 3. c. 27. 33 Geo. 3. c. 50. 41 Geo. 3. c. 23. 42 Geo. 3. c. 102.

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other woods for cabinet ware, horses, asses, mules, and cattle, being the growth or production of any of the colonies or plantations in America, or of any country on the continent of America, belonging to or under the dominion of any foreign European sovereign or state, and all coin and bullion, diamonds and precious stones, may be imported from any of the said countries into the several ports of Kingston, Savannah La Mar, Montego Bay, Saint Lucia, Antonio, and Saint Anne, in the island of Jamaica, the port of Saint George in the island of Grenada, the port of Rosseau in the island of Dominica, the port of Saint John's in the island of Antigua, the port of San Josef in the island of Trinidad, the port of Scarborough in the island of Tobago, the port of Road Harbour in the island of Tortola, the port of Nassau in the island of New Providence, one of the Bahama islands, the port of Pitt's Town in Portland Harbour in Crooked Island, another of the Bahama islands, the port of Kingston in the island of Saint Vincent, and the principal port in the island of Bermuda, in any foreign sloop, schooner, or other vessel whatever, not having more than one deck, and being owned and navigated by persons inhabiting any of the said colonies or plantations in America, or countries on the continent of America, belonging to or under the dominion of any foreign European sovereign or state; and by the statute 47 Geo. 3 sess. 2. c. 34., any of the articles permitted to be imported and exported by the port of San Josef in Trinidad in any foreign vessel, by the statute of the 45th of the king, may be imported into or exported from the port of Amsterdam in the island of Curaçoa in the West Indies in like vessels, but subject to the regulations of the free port act; and by the statute 49 of the King, c. 22. the like privilege is extended to all the ports in the island of Jamaica mentioned in the free port act, to import into and export from the port of Falmouth in the said island; and the 57 Geo. 3. c. 74. permits all such goods to be imported into and exported from the port of Maria in Jamaica, into and from the port of Bridgetown in the island of Barbadoes, from and to any of the plantations in America under the dominion of any foreign European sovereign or state; both acts enacting that such importation and exportation shall be governed by the provisions of the free port act. By the *second* section of the free port act, 45 Geo. 3. c. 57. it is provided that *tobacco* the growth or production of any island or continental country of America, under the dominion of any foreign *European* state, may be also imported into the same ports upon paying on importation here

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the like duties as payable on tobacco of the West Indies or the United States It was deemed proper that some of the ports by this act (45 Geo. 3. c. 57.) made free for the importation or exportation of the commodities in the first section mentioned, should have still further liberty granted to them, (subject nevertheless to the controul of his Majesty in council) by allowing the *importation* into them of some other commodities; thus the fourth section of this act enacts, that it shall be lawful to import into the said port of Nassau in the island of New Providence, and into the said port of Pitt's Town in Portland Harbour in Crooked Island, and into such other port or ports in the said Bahama Islands, and into the principal port in the island or Bermuda, and such other port or ports in the islands called Caicos as shall be approved by his Majesty in council, *sugar and coffee* the produce of any foreign country or plantation in such foreign ships as are described by the first section. The fifth and sixth sections state that no duties shall be payable on importation or exportation into or from the said ports, and state what shall be paid on importation from thence here; and the seventh section provides that no foreign ship shall import from any of the before-mentioned places in America any goods except those before enumerated. The act goes no further on the head of *importation*, but the *eighth section* permits that *British* rum and negroes, and all goods legally imported (except masts, yards, bowsprits, pitch, tar, turpentine, and such iron as shall have been brought from the British colonies or plantations in America), may be again *exported* to any of the colonies or plantations in America, or any countries on the continent belonging to or under the dominion of any foreign European sovereign or state, in any sloop, schooner, or other vessel whatever, not having more than one deck, and being owned and navigated by persons inhabiting any such colony, plantation, or country. So much of this enactment as relates to *negroes* was annulled by 47 Geo. 3. stat. 1. c. 36., which to the honor of the present age has effected the total and final abolition of the slave trade. (1)

It is provided by the 13th section (45 Geo. 3. c. 57.), that if any such foreign ship or vessel as aforesaid, arriving at or in any of the aforesaid ports, shall have on board any goods or

(1) An American ship engaged in the slave trade is now subject to capture. Case of the Amedie, 1 Acton's Rep. 240. Tatum v. Hodgson, 6 T. R. 656.

commodities whatever of the growth, production, or manufacture of the East Indies, or other places beyond the Cape of Good Hope, the goods shall be forfeited, together with the ship, with all tackle, &c., whether it was intended to land the goods or not, or whether bulk shall have been broken or not. And by the 14th section, no fee is to be paid for any entry, cocquet, clearance, or passport, for any such foreign ship, or any such goods imported as aforesaid.

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These are not the only enactments of this statute, but there are others relating to the importation of European goods, and goods the produce of the East Indies, which we will presently consider (1). Upon a reference to the act 42 Geo. 3. c. 102., one of the free port acts repealed by the present free port act, it will be seen that the port of Road Harbour, in the Island of Tortola, was, under that act, a free port for the importation of foreign sugar and coffee, similar to the ports of Nassau and Pitt's Town. This port, by some error or mistake, had been omitted in the act 45 Geo. 3. c. 57. It was judged expedient to re-admit this port to its former privileges; and the stat. 46 Geo. 3. c. 72. enacts, that it shall be lawful for his Majesty in council to permit the importation into the port of Road Harbour, in the island of Tortola, one of the Virgin Islands, and the exportation from thence into this kingdom, of all such goods as are permitted to be imported into the port of Nassau in the island of New Providence, one of the Bahama islands, and to be exported from thence into this kingdom, in the same manner, on the same duties and drawbacks, and subject to the same regulations, penalties, and forfeitures, as are provided respecting importation into and exportation from the port of Nassau, and further subject to such regulations as shall from time to time be directed by his Majesty, by the advice aforesaid. The second section gives permission to import into the above-mentioned ports all sugars duty-free, but subject nevertheless to such regulations as his Majesty in council may propound. And all sugar imported from thence into Great Britain and Ireland, other than such as shall be actually the produce of the British Virgin islands, and exported as such under the proper certificates, but which certificates shall not be given for any greater quantity than 5,880,000lbs., shall be deemed to be foreign sugar, and be imported into the United Kingdom as such, and subject to all the

(1) Post.

(2) Pope, tit. 134.

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regulations relating thereto. The 45th of the king constituted but two ports free out of all the Bahama islands, viz. those of Nassau and Pitt's Town, in the respective islands of New Providence and Crooked Island. This privilege is now extended to all the Bahama islands where there is a custom-house, to come in ballast, or to import or export any of the commodities in the act 45 Geo. 3. c. 57. under the regulations of that act. The article salt is allowed by this act to be exported from the Bahama islands, subject to the duty of tonnage and the regulations of stat. 28 Geo. 3. c. 6., of which we shall presently speak (1). These, then, are the only articles that form any exception to the first rule, and may be imported in any foreign vessel not having more than *one deck*. But now the statute 50 Geo. 3. c. 21. permits any such importation or exportation in any foreign *sloop or schooner*, to or from any of the above-mentioned free ports, under the regulations of the free port act, although such vessel shall *have more than one deck*. This act, originally temporary, is now made perpetual by act 54 Geo. 3. c. 48.

To the goods mentioned in the free port act, some others have been added by the 48 Geo. 3. c. 125. s. 2., which may be imported and exported into and from any of the above-mentioned free ports, inclusive of the port of Amsterdam, mentioned in the act 47 Geo. 3. sess. 2. c. 34., under the provisions of the statute, viz. rice, grain of all sorts, and flour, from any of the plantations in America belonging to and under the dominion of any foreign European sovereign or state, in the like foreign vessels, manned and navigated by persons inhabiting any of the said plantations. These acts all go, by their express provisions, to the total exclusion of the United States citizens, who are not by them permitted to partake of this trade; but we shall see that some privileges of trading with our West Indian colonies have been granted to them. Thus we find that by the stat. 28 Geo. 3. c. 6. s. 5. it is permitted to any vessel belonging to the inhabitants of the United States of America, coming *in ballast and not otherwise*, to enter the ports of Turk's island for the purpose of being there laden with salt, under the regulations in that act mentioned (2). And this privilege is extended to the ports of Nassau and Exuma, and the ports of the Bahama islands, for the same purpose and for no other, and under the same restric-

(1) Post.

(2) For which see sections 6, 7, 8, of the act.

tions and regulations, by the act 44 Geo. 3. c. 101.; and by the 52 Geo. 3. c. 79. s. 1., any sugar and coffee the growth of any of the British plantations in the West Indies, imported into Bermuda by any British-built ship, may be exported from thence by the port of St. George in the said island to any part of the territories of the United States, in any foreign vessel in amity with his Majesty, above 60 tons burthen; and by the second section, the articles enumerated there may be imported by the same port from the United States in any foreign vessel belonging to any country in amity with his Majesty. This privilege is extended to the port of Hamilton by act 53 Geo. 3. c. 50. In addition to the above articles permitted *to be imported* from the United States in foreign vessels, the articles of fruit and vegetables, being the produce of the United States, may be imported; and in addition to the articles permitted to be exported from Bermuda by any foreign vessel, rum and molasses now form a part, by the act 57 Geo. 3. c. 28. s. 1.

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Such, then, are the *chief* exceptions to the first general rule before laid down, which has not been altered but in this respect since the time of William the third. The reader, however, must be aware, that in the multiplicity of goods and commodities that form the chief object of the trade with the colonies, it would be utterly impossible, in a work of this nature, to notice every article that might in some way form an exception to the foregoing general rule; it will therefore suffice to refer generally to Mr. Pope's excellent work on the Laws of Customs and Excise, where every exception is accurately detailed under the name of any place from whence any particular articles may come, or from which it may be desired to export such commodity.

3dly, We are to consider, *What goods, the growth, production, or manufacture of any of the British possessions abroad, must be imported from thence to the United Kingdom before they can be transported to the other parts of the world in want of these articles* (1), *with the exception of certain goods which may be imported into Europe to the southward of Cape Finisterre?* We have before seen how effectually the foregoing enactments provided that the plantation trade should be carried on in none but English-built ships, excepting in some particular ports where foreign ships were permitted to enter for the purposes of trade.

(1) See division of subject, ante, 212.

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The vast accession of trade thus secured to English shipping by these provisions received a further encouragement by the eighteenth section of the navigation act, 12 Car. 2. c. 18.; for it was then deemed proper that some of the principal productions of the colonies, and which are enumerated in the act, should be brought into the mother country, and from thence distributed to the other parts of the world in want of these articles; thus at once securing the trade of the colonies to England, and making her merchants the carriers of those commodities to the rest of the universe (1). Accordingly, the eighteenth section declares "that *no sugar, tobacco, wool, indigoes, ginger, fustick or other dyeing wood, of the growth, production, or manufacture of any English plantations in America, Asia, or Africa*, shall be shipped, carried, conveyed, or transported from any of the said English plantations to any land, island, territory, dominion, port, or place whatsoever, *other than to such other English plantations as belong to his Majesty, or to the kingdom of England or Ireland, or principality of Wales, or town of Berwick-upon-Tweed, there to be laid on shore*, under pain of forfeiting the goods or the value thereof, and also the ship with all her guns, tackle, &c.; one moiety to the king, and the other to the informer." Some other articles have been added by subsequent statutes to this list, but the addition is inconsiderable; and this branch of trade has not, like the others, been subject to so many vicissitudes and alterations. Rice and molasses had become a very considerable article of export to Europe, and a very lucrative trade was carried on in these commodities with the colonies and other parts of the world, without returning any sort of profit to the mother country; it was therefore judged expedient to add these to the list laid down in the act of Charles, which was accordingly done by the stat. 3 & 4 Ann. c. 5.; and beaver skins and furs and copper ore are placed among the number by 8 Geo. 1. c. 15. s. 24. and c. 18. s. 22.; and by 4 Geo. 3. c. 15. s. 27. coffee, pimento, cocoa nuts, whale fins, raw silk, hides and skins, pot and pearl ashes, of the production of any British plantation in America, shall be imported from thence directly into Great Britain or Ireland, or some other British plantation, under the securities, penalties, and forfeitures

(1) See observations of Lord Ellenborough in Lubboch v. Potts, 7 East, 454. The act of union with Scotland, 5 Ann. c. 8. art. 4. and 12 Geo. 2. c. 30. and 15 Geo. 2. c. 33. and the act of union with Ireland, 39 & 40 Geo. 3. c. 67. art. 6. place Scotland and Ireland in the same situation as England.

mentioned in the 12 & 25 Cha. 2. c. 18 & 7. The provisions of the act of Anne, relative to the importation of molasses into England, is still further enforced by the last-mentioned act of the king, in order, as is stated in the preamble to the twenty-third section, to remove very great grievances complained of in the American settlements, by the clandestinely running on shore of large quantities of foreign molasses. This act declares that bond should be given in the like penalty as that respecting enumerated goods required by stat. 12 Car. 2. c. 18., at any port in the British colonies or plantations, with one surety besides the master of the ship, taking on board goods not particularly enumerated in any of the foregoing acts, being the product or manufacture of the said colonies or plantations, with condition that if any molasses or syrups, the produce of any plantations not under the dominion of his Majesty, shall be laden on board, the same shall be brought without fraud or wilful diminution by that ship to some of his Majesty's colonies or plantations, or to some port in Great Britain or Ireland; and that the master on his arrival shall make a just and true report of all the goods laden on board: all goods laden on board before such bond given are to be forfeited by the twenty-eighth section. It will be seen that iron and lumber are made two of the enumerated articles (1); for it is thereby declared, that no *iron*, or any sort of wood commonly called *lumber*, specified in the act 8 Geo. 1. c. 12. s. 2., of the growth, &c. of any British colony or plantation in America, shall be loaden on board before bond given, with one surety, in double the value of the goods, that such goods shall not be landed in any other part of Europe but Great Britain and Ireland.

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Such, then, are the goods of the growth, production, or manufacture of the British colonies that must be first landed in England before they can be transported to any other port; but amongst these articles there are some that may be imported into some other European ports under certain restrictions, but as they form an exception to the general result of these laws, we will postpone the consideration of them for the present: this result then will be found to be, that no sugar, tobacco, cotton wool, indigoes, ginger, fustic or other dying woods, rice, molasses, copper ore, beaver and fur skins, of the growth, production, or manufacture of any of the British plantations in America, Asia,

(1) 4 Geo. 3. c. 15. sect. 28. Reeves, 2d ed. 79.

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or Africa, or coffee, pimento, cocoa nuts, whale fins, raw silk, hides and skins, pot and pearl ashes, iron, or lumber, of the growth, production, or manufacture of the British possessions in America, may be transported to any place whatsoever, other than to some British plantation, or to Great Britain or Ireland.

The *exception* before alluded to is that founded on the statute 5 Geo. 3. c. 45., whereby it is enacted, that such lumber as is mentioned in act 4 Geo. 3. c. 15. s. 22. may be carried to the Madeiras or the Western Isles called the Azores, or to any part of Europe to the *southward* of Cape Finisterre, upon bond given that they shall be landed there, and not in any other part of Europe except Great Britain, to be discharged on producing certificates of their being so landed. Another exception is made by 52 Geo. 3. c. 98., which enacts that "it shall be lawful for any of his Majesty's subjects to ship, in any of his Majesty's sugar plantations in America, any sugar, coffee, or cocoa, being of the growth and produce of any such plantation, and to export the same direct to any port in Europe to the *southward* of Cape Finisterre, and to import in the said plantations any sort of corn or grain, direct from any such ports in Europe, or from any place on the coast of Africa to the northward of the thirtieth degree of north latitude, in such vessels and under such licences, entries, securities, regulations, penalties, and forfeitures, as are therein-after particularly described for that purpose." But the second section provides that no sugar, coffee, or cocoa shall be shipped or laden in any of the plantations for the purpose of being carried to a port in Europe to the southward of Cape Finisterre, except in British-built ships, owned, navigated, and registered according to law, nor unless a licence shall have been first taken out for that purpose, under the hands and seals of the collector and comptroller of the port at which such sugar, coffee, or cocoa is intended to be shipped or laden; the form of which licence shall be settled under the direction of the commissioners of customs in England, subject to the regulations thereafter mentioned; that is to say, that *notice* be first given in writing by the master, or by one or more owner or owners of such vessel, to the collector and comptroller of such port, of the intention of such master or owner or owners that such vessel shall, when laden, proceed direct to some port in Europe to the southward of Cape Finisterre, and export from thence, or from some place on the coast of Africa to the northward of the thirtieth degree of north latitude, corn or grain to be carried

direct to the plantation from which such vessel shall have sailed; and the person intending to ship such sugar, coffee, or cocoa, shall then make oath before the collector and comptroller of the said port, that it is his full intention and resolution to load such vessel with sugar, coffee, or cocoa, for exportation direct to some port in Europe to the southward of Cape Finisterre, and to no other place whatever; and the master, or owner or owners, together with the person so intending to ship the said coffee, shall thereupon enter into *bond* to the use of his Majesty in treble the value of the articles, with *condition* as specified in the act.

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4thly, We are to consider, *What goods may be imported from the British colonies into certain parts of Europe?* (1) The trade with the colonies in the articles not included in the provisions considered under the last subject of inquiry, was by 12 Car. 2. c. 18. left entirely open and free from any kind of restraint or prohibition; and these articles, commonly known under the term *non-enumerated*, might under that act have been imported into any port of Europe (2). This kind of free trade continued without any interruption till very early in the beginning of the reign of George III., when it was thought advisable to subject it to some restrictions, in order to prevent any illicit trade that might be carried on with the prohibited foreign ports of Europe in the *enumerated articles*, by ships ostensibly loading *non-enumerated goods* on board of them for those ports, as well as to prevent the clandestine importation of foreign European goods into the colonies. Indeed, such illicit trade had been prosecuted very extensively, to the great detriment of the revenue as well as to the trade of the kingdom: it was therefore determined to prevent it altogether; and it was enacted by 6 Geo. 3. c. 52. s. 30. that bond shall be given *in the colonies*, with one surety besides the master of the ship, who shall take on board non-enumerated commodities, with condition that such goods *shall not be landed at any port of Europe to the northward of Cape Finisterre, except in Great Britain*; and to produce a certificate of landing goods in Great Britain within eighteen months, and in any British colony in America within six months, under the hands and seals of the collector and comptroller or other principal officer of the customs; and in any other place where the same may be legally landed, the like certificate within twelve months,

(1) See division of subject, ante, 212. (2) Reeves, 2d ed. 492.

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under the common seal of the magistrate, or under the hands and seals of two known British merchants residing there, or on proof by oath that the goods were taken by enemies or perished in the sea; and if non-enumerated articles are put on board before such bond has been given, the ship and goods are forfeited; but by the thirty-first section, this clause is not to extend to vessels *bonâ fide* bound to some of the ports of Spain, in the Bay of Biscay. The provisions of this act have been further extended by the stat. 9 Geo. 3. c. 28. s. 3., which enacts that any *non-enumerated* articles, except rum, laden as therein expressed in any British colony or plantation, may be landed in the islands of Guernsey or Jersey, and that the said act 6 Geo. 3. c. 52. and its regulations relating to the bond and security for landing such non-enumerated goods in Great Britain, shall be construed to extend to the said islands; and that all bonds made and entered into in pursuance of the said recited act may be discharged by the certificate under the hands and seals of the magistrates of the royal courts of Jersey or Guernsey respectively, or any three of them, and the principal officer of the customs, testifying the landing such goods there, in the same manner as if the said goods had been landed in Great Britain or Ireland (1). An illicit trade being carried on through the *Isle of Man*, it was provided by stat. 5 Geo. 3. c. 39. that no rum or other spirits shall be shipped in any British plantation in America, before bond given that they should not be landed in the Isle of Man, under the like securities and penalties as those provided in stat. 12 Car. 2. c. 18. and stat. 25 Car. 2. c. 7. (2)

5thly, We are to consider, *From what ports goods and commodities may be shipped for transportation to the British colonies?* (3) No particular ports had been pointed out by the navigation act for this purpose; and, consequently, one European port was equally eligible to the shipment of such productions for the colonies as another; but it was required that the ship employed should be an English or plantation-built ship, navigated according to law (4). This liberty of choice as to the port did not however continue very long, for in three years after the enactment of the great navigation act, 12 Car. 2. c. 18., a ge-

(1) Reeves, 2d ed. 492, 3.

(2) Reeves, 2d ed. 493 & 79. See further regulations respecting the Isle of Man, Pope's Customs, title 48.

(3) See division of subject, ante, 212.

(4) See the act, ante, 211.

neral prohibition was introduced, limiting the ports for shipping European articles for the colonies to those of Great Britain: thus the stat. 15 Car. 2. c. 7. s. 5. recites, "that in regard his Majesty's plantations beyond the seas are inhabited and peopled by his subjects of his kingdom of England, for the maintaining a greater correspondence and kindness between them, and keeping them in a further dependence upon it, and rendering them yet more beneficial and advantageous unto it in the further employment and increase of English shipping and seamen, vent of English woollen and other manufactures and commodities, rendering the navigation to and from the same more safe and cheap, and making this kingdom a staple not only of the commodities of those plantations but also of the commodities of other countries and places, for the supplying of them, and it being the usage of other nations to keep their plantation trade to themselves;" and then the sixth section enacts, "that no commodity of the growth, production, or manufacture of *Europe*, shall be imported into any land, island, plantation, colony, territory, or place to his Majesty belonging, or being in his possession, in Asia, Africa, or America (Tangier only excepted), but what shall be *boná fide* and without fraud laden and shipped in England, Wales, or the town of Berwick-upon-Tweed (1), and in *English-built shipping*, and whereof the master and three fourths of the mariners at least are English, and which shall be carried *directly* thence to the said lands, islands, plantations, colonies, territories, or places, and from no other place or places whatsoever, under the penalty of the loss of all such commodities of the growth, production, or manufacture of Europe, as shall be imported into them from any other place whatsoever, by land or water; and if by water, of the said ship or vessel also in which they were imported, with all her guns, tackle, furniture, ammunition, and apparel; one third part to the king, and one third part to the governor of such land, &c. and the other third part to the informer, if informed against in such land, &c, and if not, to the king.

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Upon this section, requiring that the importations into the colonies shall be *direct* from Great Britain, it has been held that it is illegal to export manufactures, the produce even of England, from the Cape of Good Hope to any port to the east-

(1) Extended to Scotland and Ireland by the acts of union, 5 Ann. c. 8. art. 4. 12 Geo. 2. c. 30. 15 Geo. 2. c. 33. 39 & 40 Geo. 3. c. 67. art. 6. 7 East, 454.

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ward in his Majesty's possession, and that the operation of this statute was not suspended by the order in council of the 12th of April 1809, or that of October 1811; and that consequently an insurance on goods so exported was invalid. (1)

But this general prohibition as to *all* commodities and *all* ports, was modified by the enactment in the following section, in order to support the fisheries of Newfoundland, and the trade that was carried on in the article *salt* by the foreign ports of Europe with Newfoundland, and in wines the produce of the Madeiras and the Azores. Thus the seventh section enacts, that it shall be lawful to ship and lade in such ships and so navigated as in the foregoing clause is set down and expressed, in any part of Europe, salt for the fisheries of New England (2) and Newfoundland and to ship and lade in the Madeiras, wines of the growth thereof; and to ship and lade in the western islands of Azores, wines of the growth of the said islands; and to ship and take in servants or horses in Scotland or Ireland; and to ship or lade in Scotland all sorts of victual of the growth or production of Scotland; and to ship or lade in Ireland all sorts of victual of the growth and production of Ireland; and the same to transport into any of the said lands, islands, plantations, colonies, territories, or places (3). The privilege limited to English-built ships, English manned and navigated, to export salt, an article so essentially necessary for the maintenance and support of our fishing establishments in North America, has been extended to the colony of Nova Scotia and Quebec by the stat. 4 Geo. 3. c. 19. This last provision, which was originally only of a temporary duration, has been made perpetual by the act 48 Geo. 3. c. 22.

By these means the chief commodities of Europe required in the British colonial possessions are centered in England before they can be transported for the plantations; but we shall see that in succeeding years it has been found necessary in some measure to relax the regulations imposed by the statute of Charles II. Thus, for the encouragement of the *British fisheries* in North America, it was deemed proper to form another

(1) Gray and another v. Lloyd, 4 Taunt. 136.

(2) This province is now part of the United States of America.

(3) The latter part of this clause, since the union of England with Scotland and Ireland, may be considered as virtually repealed by the general licence introduced by the union acts. Ante, 227, n. 1.

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exception to the enactment in the 15 Car. 2. c. 7. sect. 6. by allowing the islands of Guernsey and Jersey to export European manufactures of a certain kind to the American plantations. This was authorized by the stat. 9 Geo. 3. c. 28. which provides that any sort of craft, cloathing, or other goods, the growth, production or manufacture of Great Britain, or of those islands, and food or victuals, being the growth or produce of Great Britain, Ireland, or those islands, may be transported from those islands to Newfoundland, or any other British colony where the fishery is carried on, the same being necessary for the fishery, or the mariners or persons employed therein.

This part of the policy in our colonial system was departed from in another instance, but in which a more important colonial object would at the same time be greatly promoted, as the benefits derived from the fisheries seem to be of the greatest importance to this kingdom, especially from the Newfoundland fishery. In the distress occasioned to the Newfoundland trade by the war in the countries of the Mediterranean, it was considered whether a depôt of fish could not be made at *Gibraltar* and *Malta*, and the ancient markets be supplied from stores laid up at those fortresses. In projecting this trade it was seen that not only great assistance would be given to the fish merchant, but great encouragement would be holden out to foreign purchasers, if European produce requisite for the colonies could be shipped and transported direct from those two places of resort (1). To authorize this, it was enacted by statute 46 Geo. 3. c. 116. that fruit, wine, oil, salt, or cork, the produce of any part of Europe south of Cape Finsiterre, may be shipped and laden in any place in Europe south of Cape Finisterre, for exportation direct to any of the several ports herein-after mentioned; that is to say, Saint John's in New Brunswick, Saint John's in Newfoundland, Quebec in Canada, Sydney in Cape Breton, Halifax and Sherburne in Nova Scotia, Charlotte Town in Prince Edward's Island, all in North America; on board any British ship owned, navigated, and registered according to law, which shall have arrived at any place in Europe south of Cape Finisterre with articles of the growth or production of the said colonies, or with fish taken and cured by his Majesty's subjects carrying on the fisheries from any of the said colonies, or from any part of the united

(1) Reeves, 2d ed. 300.

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kingdom, or with any of the goods therein mentioned from Canada, whether such goods shall be the growth or produce of Canada, or shall have been brought into Canada by land or inland navigation. (1)

In a former page we alluded to the free port act 45 Geo. 3. c. 57. having some other provisions than those there mentioned (2). These provisions have however, so far as they relate to *European* goods, been much enlarged; by the 9th section of the act 45 Geo. 3. c. 57. it is lawful to export in any British vessel owned and navigated according to law, *from any of the islands* in that act particularly mentioned *to any British plantation* in America or the West Indies, any goods of the manufacture of Europe; and also any goods which shall have been legally imported into any of the said islands from any of the plantations in America, or any country on the continent of America, belonging to or under the dominion of any foreign European sovereign or state; but this privilege being limited to particular islands, and it being found expedient to extend the privilege to all the British West India islands and British colonies on the continent of America, it was accordingly enacted by the 52 Geo. 3. c. 100. that it shall be lawful for any of his Majesty's subjects to export, in any British-built vessel owned and navigated according to law, from any one of the islands in the West Indies belonging to his Majesty to any other of the said islands, or to any British colonies on the continent of America, and from any one of the British colonies in America, to any of the islands in the West Indies belonging to his Majesty, or to any other British colony or plantation on the *continent* of America, any goods whatsoever *of the manufacture of Europe*, and also any goods or prize goods which shall have been legally imported into any one of the said islands and colonies under the regulations mentioned in 45 Geo. 3. c. 57.; but this privilege did not extend to the islands in North America; but the island of Newfoundland now enjoys this advantage under the enactment in the act 57 Geo. 3. c. 29.

The regulations which we have just noticed, it will be observed, relate principally to the importation of *European* produce into the colonies; it will now be necessary to notice how

(1) See further regulations, Pope on Customs, titles 73 & 74. 51 Geo. 3. c. 97. 52 Geo. 3. c. 98. (2) Ante, 216.

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far the exports and imports *of the produce of the British plantations themselves, from and to each other*, are restrained or regulated. There is no enactment in the great navigation act, 12 Car. 2. c. 18., which prohibits the transportation of the produce of one colony to another; and the eighteenth section of that act, which prohibits the conveyance of sugar, tobacco, cotton wool, indigoes, ginger, fustick or other dying wood, of the growth, production, or manufacture of any English plantations in America, Asia, or Africa, otherwise than to Great Britain or Ireland, expressly excepts the English plantations from that prohibition. But it being found that, under colour of such permission to export those enumerated commodities from one plantation to another, the same were illegally imported direct into Europe free of duty, it was provided by the 25 Car. 2. c. 7. that before any vessel shall be allowed to export such enumerated articles from the colonies, she shall first give bond to import and unlade the same in Great Britain, or pay certain specified duties (1). Subsequent statutes have placed other articles, as rice, molasses, copper ore, &c. under the same regulation (2); but on payment of the duties there seems to be no general prohibition, under the navigation laws, against the export of the produce of one British plantation to another. However, we have seen that the exception of English plantations in the eighteenth section of 12 Car. 2. c. 18., does not authorize the shipping of colonial produce from the British West India islands to Gibraltar, that not being a plantation within the meaning of the exception. (3)

6thly, The next subject that claims our attention is the *method of enforcing obedience to the laws before laid down* (4). This part of the law of trade takes its origin from the navigation act, though succeeding provisions have greatly extended and aided its operation. The act of navigation, in the nineteenth section, enacts, that for every ship which shall set sail out of or from England, Ireland, Wales, or town of Berwick-upon-Tweed, for any English plantation in America, Asia, or Africa, *sufficient bond* shall be given, with one surety, to the chief officers of the custom-house of such port or place from whence the said ship

(1) 25 Car. 2. c. 7. s. 2. per Lord Ellenborough, in Lubboch v. Potts, 7 East. 454.

(2) 3 & 4 Ann. c. 5. 8 Geo. 1. c. 18. s. 22. 7 & 8 W. 3. c. 22. See other enumerated articles, ante, 222.

(3) Ante, 213. and per Lord Ellenborough in Lubboch v. Potts, 7 East. 454.

(4) See division of the subject, ante, 212.

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shall set sail, to the value of one thousand pounds, if the ship be of less burthen than one hundred tons; and of the sum of two thousand pounds if the ship shall be of greater burthen: that in case the said ship shall load any of the said commodities at any of the said English plantations, the same commodities *shall be by the said ship* brought to some port of England, Ireland, Wales, or to the port or town of Berwick-upon-Tweed, and shall there unload and put on shore the same, the danger of the seas only excepted (1). And for all ships coming from any other port or place to any of the aforesaid plantations, who by this act are permitted to trade there, that the governor of such English plantations shall, before the said ship be permitted to load on board any of the said commodities, *take bond* in manner and to the value aforesaid for each respective ship, that *such ship shall carry all* the aforesaid goods that shall be laden on board in the said ship, to some other of his Majesty's English plantations, or to England, Ireland, Wales, or town of Berwick-upon-Tweed. And that every ship which shall load or take on board any of the aforesaid goods until such bond given to the said governor, or certificate produced from the officers of any custom-house of England, Ireland, Wales, or of the town of Berwick, that such bonds have been there duly given, shall be forfeited, with all her guns, tackle, apparel, and furniture, to be employed and recovered in manner as aforesaid. And the said governors, and every of them, shall *twice* in every year, after the first day of January one thousand six hundred and sixty, return true copies of all such bonds by him so taken to the chief officers of the customs in London. The 19th section of the 12 Car. 2. c. 18. only extended to the *enumerated* articles in the 18th section mentioned; but we shall presently see, that where other articles have been added to this list, there is a provision made in the act of the like nature to reach them also. Governors in the plantations and colonies are required by the second section, by oath, to do their utmost that the *before-mentioned* regulations should be punctually and bonâ fide observed; and a governor willingly negligent in doing this duty is to be removed from his government. An oath of the like nature is required of all such governors, to enforce obedience to the laws in *that* act mentioned by the stat. 15 Car. 2. c. 7. s. 8.; it enacts, that governors in the plantations are to take a solemn oath for

(1) The reader will qualify this part of the act by the provisions of the subsequent acts relative to the discharge of her cargo.

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the special performance of the duty imposed on them by this act; and if they offend, they forfeit their government, and are incapable of holding any other, and £1000, half to the king and half to the informer. The ninth section (1) directs, that if any officer of the customs in England shall give a warrant or suffer any of the enumerated articles to be carried into any other place before they have been put on shore in England, Wales, or Berwick, he shall forfeit his place, and the value of the goods. The 19th section of the navigation act requires copies of the bonds taken under the authority of that act to be returned *twice* a year to the custom-house at London. But by the provision of the 22 & 23 Car. 2. c. 26. s. 12. it is enacted, that the governors in the plantations *shall once a year, at least*, make a return of a list of all vessels lading the commodities in the 18th section named, as also a list of all the bonds taken by them; and then directs, that in case any vessel belonging to his Majesty's plantations, which shall have on board any of the enumerated articles, shall have unladen in any port in Europe other than Great Britain, she is to be forfeited, with all her guns, &c.

The requisition of these bonds, and the strict rules laid down in the different statutes, did not, it seems, effect its object in securing the due observance of the law, or in carrying into operation their provisions, by increasing the revenue of the customs, as it was expected to do; for, in spite of all these enactments, it appears that a very considerable contraband trade was carried on by the plantations in defiance of these acts (2); and therefore, in order effectually to prevent it in future, an export duty was imposed by stat. 25 Car. 2. c. 7., where no bond had been given with one surety to land such goods in England, Wales, or the town of Berwick. Notwithstanding even the provision of the act of the 25 Car. 2. c. 7., very great difficulty was experienced in executing these statutes. The people of New England openly contemned and disregarded them; and the inhabitants of Boston did not shew any very great inclination to observe and comply with them. But the more obstinate the colonists became, the more firm was the government at home; and so far was the opposition of the colonists from effecting any change, that it only tended to make the home government more resolute, and more determined to execute the letter of law. With this view, the act of 7 & 8 W. 3. c. 22., entitled "An act for preventing frauds and

(1) 15 Car. 2. c. 7.

(2) See recital, 25 Car. 2. c. 7. s. 2. and 7 East. 454, 5.

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regulating abuses in the plantation trade," was passed; and many provisions were there made to effect the object, which the statutes of Charles seem not wholly to have done.

On reference to the second section of the navigation act (1), it will be seen, the governors of colonies were to take an oath to observe only *the before-mentioned regulations*, which, as they were contained in the first section, were of a very limited extent: to remedy this inconvenience, the fourth section of this act, after reciting as above, enacts, "that all the governors of plantations, before entrance into their government, shall take a solemn oath to do their utmost that all regulations then in force, and all the enactments of that act should be punctually observed; and this clause is still further confirmed by the stat. 4 Geo. 3. c. 15., which extends the oath to all acts in force up to that time. Another very great grievance was, that an officer in the plantations, established under the authority of the act 15 Car. 2. c. 7., and usually called "the naval officer," by his connivance permitted many frauds to be committed: by the fifth section this officer is required to give security for the true and faithful discharge of his duty; and until they do so, the governor is answerable for their neglects or misdemeanors; and by the sixth section all the rules laid down by the stat. 13 & 14 Car. 2. c. 11., with respect to entering, lading, or discharging, are extended to the plantations. After the passing of the act of 25 Car. 2. c. 7., imposing an export duty on the exportation of colonial produce, the colonists endeavoured to construe the act into permission to trade with Europe; the eighth section sets this matter at rest, and declares, that notwithstanding the payment of such duties, no goods shall be shipped on board until such security as required by the act of navigation is given, and so *toties quoties* as any of the said goods shall be brought to be reshipped in any of the said plantations, under the forfeiture of the ship and goods; the ninth section declares all laws or customs contrary to the act void; the tenth section makes regulations to prevent the obtrusion of false or counterfeit certificates and cocquets; and the thirteenth section provides that the security to be given on bonds taken in the plantations should be persons of ability to pay the value mentioned in the said bonds, and makes a further regulation as to the condition of the bond. The commissioners of the treasury are au-

(1) 12 Car. 2. c. 18. s. 2.

thorized by the eleventh section to appoint officers of the customs in the plantation as often as they shall think necessary; and it was provided, that upon juries in causes of unlawful importation or exportation there should be none but natives of England or Ireland, or persons born in the plantations, "a corrective," says Mr. Reeves (1), "of so little force, that they were at length obliged to institute courts of admiralty." (2)

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Of the Trade with the United States of America.

We will now consider the regulations respecting the *American trade*, so far as they affect the United Kingdom and her plantations and possessions abroad. That part of America now known under the general term of the *United States of America*, continued till a very late period to be subject to the crown of Britain; and whilst the inhabitants retained their character of colonists, they were subject to the same laws that now obtain for the government of British possessions in Asia, Africa, and America. The revolution that took place dispossessed the British crown of these dominions; and the same event that released the American colonists from the provisions of those laws, at the same time subjected them, as an independent state, to the more severe restrictions of the third section of the navigation act (3). According to the divisions before laid down, the trade of the United States ought to have been considered in that part of our subject which relates to the general trade with Asia, Africa, and America; but it will be perceived, that from the propinquity of this new government to our own colonial possessions, and the line of policy that has been adopted for the regulation of the trade of Great Britain with America, it has been greatly interwoven with the English system of colonial traffic: and it therefore became expedient to postpone the consideration of the subject until we had concluded our inquiry into that branch of commercial law. Another independent government, recognized by this and other states, having been established, it became necessary to qualify the provision of the third section prior to the opening of the British ports to American ships; which, owing to the struggle between that part of America and the mother country, had been closed. After the peace with the United States was concluded, it was determined to relax the third section of the navigation act, which we may remember

(1) Page 67. 2d ed.

(2) There are several other regulations relating to this subject too numerous for insertion in this work, See Pope's Law of Customs, title I. rule 15. n. b.

(3) Ante, 192.

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prohibited any intercourse between this country with Asia, Africa, or America, other than in English shipping or shipping of the built of the British plantations, which last benefit they forfeited by asserting their independence. This was a subject of much difficulty and great hazard in the absence of any thing like good information on the point, and when nothing in the shape of experience was to be found to guide the legislature in framing a positive act with specific rules; and therefore the parliament thought proper to entrust a discretionary power to the king in council, to make from time to time such orders and regulations as should seem meet, to govern the trade of the new independent state with England. This was effected by the stat. 24 Geo. 3. c. 39., and continued without much alteration, by annual acts, till the passing of the act 28 Geo. 3. c. 6., except the insertion of a clause in one of these acts, 24 Geo. 3. c. 45., giving a further power to the king to regulate the intercourse of the new state with the British possessions abroad, as well as those at home. Some other alterations were made; but after five years experience of the temporary regulations, the act of the 28 Geo. 3. c. 6. was passed after much deliberation and discussion had been had. The provisions of this act still form the basis of the law on the trade of America with the British colonies; but it has, like all other acts, been altered or modified, explained or enlarged, by other acts, as circumstances seemed to require (1). Before, however, we state the provisions of this act, we will consider the trade of America with *England*, in order to preserve consistency of arrangement in the plan of the work, notwithstanding that, in point of time, the act regulating the intercourse of the United States with the *colonies*, was passed some time prior to that regulating the intercourse with Great Britain.

First, then, of the trade of the United States of North America with *Great Britain* herself.—It appears that this traffic was not settled on any permanent rules so soon as the trade with the West Indian and North American colonies: that trade was put on fixed principles by the stat. 28 Geo. 3. c. 6., which at the same time that it repealed the provisions of the preceding annual act, especially excepted the trade of the United States with England, and which was accordingly regulated by orders in council, under the authority of yearly bills passed for that purpose, till a treaty of peace being negociated with the United

(1) See post, note.

Of the Trade with the United States of America.

States, an act was passed to give effect to the stipulations of that treaty: this act was the 37 Geo. 3. c. 97., which expired with the treaty. The almost continual state of warfare in which these countries have been involved since the establishment of the United States, has prevented the institution of anything like permanent regulations on the subject; but since the late peace, the rules are become more fixed and determined. There is, however, one regulation that appears to be of a lasting nature, not in any way affected by peace or war. The stat. 49 Geo. 3. c. 59. declares that it shall be lawful to import into Great Britain, directly from any of the territories of the United States of America, any goods being of the growth, produce, and manufacture of any of the said United States, which are not prohibited by law to be imported from foreign countries, in vessels built in the countries belonging to the United States of America, or any of them, or in vessels taken by any of the vessels of war belonging to that government, or any of the inhabitants of the said United States (of which condemnation proof shall be given to the commissioners of customs in England or Scotland respectively), and owned by the subjects of the said states, or any of them, whereof the master and three-fourths of the mariners at least are subjects of the said United States, and to enter and land such goods, on payment of such duties as are payable on articles of the like description, when imported into Great Britain in vessels not being British-built. We have before observed on this very singular exception relative to the prize vessels (1), whereby they are allowed, if properly condemned, to enjoy the same privileges as American-built ships; an enactment which seems to hold out a reward to American cruisers to attack and take the vessels of his Majesty and his Majesty's subjects. This favorable regulation was re-enacted recently by the stat. 56 Geo. 3. c. 15. s. 1., with this further advantage, that the people of the said states are to pay no higher or greater duty than what is paid by British subjects on importation in British-built ships; and the stat. 57 Geo. 3. c. 58. enacts, that the same duties shall be paid on exportation of all goods the growth, produce, or manufacture of Great Britain, exported thence direct to the said states in British-built vessels, owned, registered, and navigated according to law, or in ships of the built of America, or condemned as lawful prize, and owned by subjects of the said states, and whereof the master and three-fourths of the ma-

(1) Ante, 190, 1.

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riners at least are subjects of the said states, as are or shall be payable on the like exportation to any other foreign state. Such is the whole of the law that regulates this branch of American trade; and as the two last-recited acts merely relate to the duties to be paid or payable on importation or exportation to America, the law of trade between the two countries seems to be regulated by the before-mentioned act of the forty-ninth of the king. (1)

We will now recur to the statute 28 Geo. 3. c. 6., relative to the trade between the United States and our *colonial possessions* in the West Indies and North America. The trade that was opened by this act affects the laws of import and export from the British colonies in the West Indies as well as the British colonies in North America; in order, therefore, not to confuse the subject, we will divide it as suggested by the statute itself, and give a review of the law on the first division, whether established by this or subsequent acts, before we proceed to the other enactments; considering, 1st, The trade with the United States of America, as it affects our colonial possessions in the West Indies; and 2dly, The trade with the United States of America, as it affects the British North American plantations or territories.

First, then, *the trade with the United States, as it affects our colonial possessions in the West Indies.* By the first section of act 28 Geo. 3. c. 6., no goods or commodities shall be imported or brought *from* any of the territories belonging to the United States of America, *into* any of his Majesty's *West India islands,* (in which description the Bahama islands, and the *Bermuda* or Somers islands, are included), under the penalty of forfeiting the goods and the ship, with all her guns, &c., except tobacco, pitch, tar, turpentine, hemp, flax, masts, yards, bowsprits, staves, heading-boards, timber, shingles, and lumber of any sort; bread, biscuit, flour, peas, beans, potatoes, wheat, rice, oats, barley, and grain of any sort; such commodities respectively being the growth or production of any of the territories of the United States of America. And by the 2d section, none of the goods or commodities in the first section excepted or described, shall be imported or brought into any of the said islands, from the said territories of the said United States, under the penalty of the

(1) Ante, 237.

forfeiture thereof, and also of the ship, with all her guns, &c., except in British-built ships, owned and navigated according to law. These two sections relate solely to the *imports into the West Indies* from the United States; the third section relates to the *exports from the West Indies into the United States.* Thus it is made lawful to export from any of the West India islands, to any port or place within the territories of the said United States, any goods or commodities whatsoever, which are not by law prohibited to be exported from the said islands, to any *foreign country or place in Europe;* and also sugar, molasses, coffee, cocoa nuts, ginger, and pimento: and that all cocoa nuts or ginger which shall be so exported, shall pay the same duties as if exported to any British colony or plantations in America. But no sugar, molasses, coffee, cocoa nuts, ginger, or pimento, or any other articles whatsoever, shall be so exported, except by British subjects in British-*built* ships, owned by his Majesty's subjects and navigated according to law, under the penalties before mentioned. This section includes an exception from the article salt, which we have seen may be exported in American vessels from Turk's islands, being part of the Bahamas.

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In order to secure the execution of this law, the system of requiring bonds is resorted to by the 4th section. Thus it is enacted, that where, on exportation of any goods or commodities to any British colony in America, a bond is now or thereafter may be required by law for the due landing of such goods or commodities in such colony, and a certificate is required to discharge such bond, a similar bond and a similar certificate in discharge thereof is required on exportation of such goods or commodities to the said states, such certificate to be under the hand and seal of the British consul or vice-consul; and if no such officer, then under the hand and seal of the officer appointed by the said states; and if no officer, then by a magistrate of the said states, on oath made of the due landing of the said goods or commodities.. The five succeeding sections relate to the exportation of salt from Turk's islands. The tenth and eleventh sections prohibit the importation, into any of the British colonies in the West Indies, of any of the goods excepted in the first section, from any colony under the dominion of any foreign European sovereign or state, except in cases of emergency, when the governor and his council may permit the importation of them in British-built ships, owned and navigated according to law. These are the only enactments that are contained in his statute

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on the subject of American trade with our colonies in the West Indies; and it now only remains, therefore, to take a concise view of the provisions that have since been enacted on this head, before we proceed to the second division.

The permission that had been given by the legislature to governors of plantations, to admit, in cases of emergency, American articles imported from foreign colonies to an entry at the custom-house, was converted into the means of carrying on a trade, perhaps not altogether illegal, but certainly far beyond the intention of the legislature; it was in the exportation of those commodities thus imported to others of our own islands. The statute 29 Geo. 3. c. 56. with a view of putting a stop to this practice, enacts, that in case any of the articles mentioned in the act 28 Geo. 3. c. 6., which shall have been imported from *any island in the West Indies under the dominion of any foreign European sovereign or state*, into any of the said islands in the West Indies, under the dominion of the king of England, shall after such importation be exported, or shall be shipped on board any boat or other vessel, or shall be brought to any quay, wharf, or other place whatever, with intention to be shipped for exportation, the said articles, and the ship, boat, or vessel laden, or intended to be laden is forfeited, with her tackle, &c. (1)

A treaty of peace having been negotiated between his Majesty the king of England and the prince sovereign of the United Netherlands, dated the 13th of August 1814: by the first additional article of this treaty, the prince sovereign of the United Netherlands cedes to his Britannic Majesty the colonies of Demerara, Essequibo, and Berbice. Upon this cession to Great Britain, it became necessary to make some parliamentary regulations with regard to these newly-acquired dominions; and the statute 56 Geo. 3. c. 91. s. 11. with this view declares, that "all the benefits, privileges, and advantages, and all the rules, regulations, and restrictions, penalties and forfeitures, in 28 Geo. 3. c. 6. with respect to his Britannic Majesty's plantations in North America and in the West India Islands, and the countries belonging to the United States of America, and between his Majesty's said subjects and the foreign islands in the West Indies, shall extend and apply and be in full force

(1) Quære, see 52 Geo. 3. c. 100. ante, 230.

and effect as to the said colonies of Demerara, Berbice, and Essequibo." Such are the whole of the regulations that relate to the traffic of the United States with the British West Indian colonies. Of the Trade with the United States of America.

Secondly, *Of the trade with the United States of America as it affects the British North American plantations or territories.* The 12th section of the act 28 Geo. 3. c. 6. declares, that no goods shall be imported from any of the territories belonging to the United States of America into the provinces of Nova Scotia or New Brunswick, or the islands of Cape Breton, St. John's, or Newfoundland, or into any country or island within their respective governments (1), under the penalty of the forfeiture thereof, together with the vessel importing the same, and her tackle, &c. Except, by the 13th section, in cases of emergency, the governor of the said places are allowed to permit the importation from the territories of the United States in British-*built* ships, owned and navigated according to law, of scantling, planks, staves, heading boards, shingles, and numerous other articles necessary for the supply of the inhabitants of the said places; and except that his Majesty in council may, by warrant under his sign manual, permit, in case of necessity, the importation into Newfoundland in British-*built* ships, owned and navigated according to law, of bread, flour, and Indian corn; and if these articles are imported in any other than British-built ships, owned and navigated according to law, a forfeiture is imposed of the ship, with her tackle, &c. and the goods. It does not appear that any provision of the nature of that contained in the 29 Geo. 3. c. 56., prohibiting the exportation of articles imported under the authority of the governor and his council in cases of emergency, has ever been made; and we may fairly presume, that if an act of parliament were required in the one case to curtail this practice, it would be requisite in another; and therefore it is legal, as the law now stands, to make *such* exportation from our North American plantations, for it is impossible by the express wording of that statute to construe the same as extending to the North American colonies. Upon the 13th section of the act 28 Geo. 3. c. 6. an order has been made, dated 30 December 1817, permitting such importation as is directed by the act. This order, together with the form of the licence, is to

(1) As to what these countries are, see 49 Geo. 3. c. 27. s. 14.

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be found in Mr. Pope's Law of the Customs and Excise (1). And the 14th section declares, that no goods whatever shall be imported from the said United States by sea or coastwise, or up the river St. Lawrence *from the sea*, into the province of Quebec, or into the countries within the government of Quebec (2), under the penalties aforesaid. The 15th section states by whom goods, &c. forfeited are to be seized, and how forfeitures are to be recovered. Such, then, are the provisions of this act, which may be called the American Colonial Intercourse Act. By it American shipping is entirely excluded from any communication with the shores of our North American colonies, as well as of those in the West Indies, except Turks islands, being part of the Bahamas, and even then it is confined to ships coming in ballast for the sole purpose of exporting salt. The prohibition contained in the 14th section of the American colonial intercourse act (3), as to importation from the United States into the province of Quebec, has been considerably modified by the act 29 Geo. 3. c. 16. The case of emergency excepted in the 13th section of this act (3), does not extend to the province of Quebec, now called Lower and Upper Canada, but only to the provinces of Nova Scotia or New Brunswick; or to the islands of Cape Breton, St. John's, and Newfoundland. It was thought advisable, that in like case of public distress, the same provision should be made: by that act it is declared lawful for his Majesty in council by order to authorize, in case of necessity, the importation of bread, flour, and Indian corn and live stock, as well into the province of Quebec, as into all the countries bordering on the coast of Labrador, for the then ensuing season *only*, *from* the United States, for the supply of the fishers there, provided such importation is made in British-*built* ships, owned and navigated according to law. And if such importation is made in foreign vessels, the forfeiture of the ship and goods ensues. The seizure is to be made by the commander of any of his Majesty's vessels of war, and others mentioned in the second section. This liberty of importation *from* the United States *into* the province of Quebec, or rather, since the act of 31 Geo. 3. c. 31., into the provinces of Lower

(1) Note a. title 135. rule 27.

(2) As to what countries, and how much of America is called the province of Quebec, see stat. 14 Geo. 3. c. 83. The province of Quebec is now divided into two parts, called Upper and Lower Canada: each division has a legislative council and an assembly. See stat. 31 Geo. 3. c. 31. 49 Geo. 3. c. 27. s. 14.

(3) 28 Geo. 3. c. 6.

and Upper Canada, is further extended by the act of 30 Geo. 3. c. 8. sect. 1. which makes it lawful for the governor, lieutenant-governor, or commander in chief, to authorize the importation by sea or coastwise, or up the river St. Lawrence from the sea, of neat cattle, sheep, hogs, poultry, or live stock of any sort, bread, biscuit, flour, or grain of any sort, and some other vegetable commodities, from the United States, in British-built ships, owned and navigated according to law. This act likewise contains an enactment as to who may seize, precisely similar to the second section of the act 29 Geo. 3. c. 16. By the stat. 30 Geo. 3. c. 29. all goods whatsoever, being the growth or production of any of the countries bordering on the province of Quebec, and legally imported by land or inland navigation from any of such countries, may be imported into Great Britain under the same duties and conditions, and subject to the same penalties, as if the same were of the growth or production of the said province of Quebec; provided it shall appear by certificate under the hands and seals of the collector and comptroller of customs there, and of the naval officer there, that the same were legally imported by land or inland navigation. If, then, some statutes have been enacted to relax the law of importation into these provinces of Upper and Lower Canada in one way, so also have others been so passed to restrain and prohibit importation in another. The 14th section of the 28 Geo. 3. c. 6. left the inland importation, and the importation *down* the river St. Lawrence *towards* the sea, entirely open and unrestrained, and by these means goods, not of the growth, production, or manufacture of the United States, found their way into Quebec; to prevent this in future, it is enacted by stat. 52 Geo. 3. c. 55. sect 1. that no goods, except goods of the growth, production, or manufacture of the territories of the United States of America, shall be brought from the said States by inland navigation or land carriage into the provinces of Lower or Upper Canada, under the penalty of the forfeiture of all such goods, or the value thereof, together with the vessel or carriage in which they shall be brought. It will be found from the 12th section of the act 28 Geo. 3. c. 6. that all American produce is excluded from importation into Nova Scotia or New Brunswick, or the islands of Cape Breton, St. John's, or Newfoundland, except in case of great public emergency. It was found necessary to relax this rule, as far as it respected Nova Scotia and New Brunswick; and therefore, by the stat. 33 Geo. 3. c. 50. it is permitted to import pitch, tar, and turpentine of the growth,

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production, or manufacture of the United States, in British-built ships owned and navigated according to law, into those two provinces. And by the 48 Geo. 3. c. 125. governors of Nova Scotia or New Brunswick, or islands of Cape Breton or St. John's, by the advice and consent of their respective councils, may authorize the importation of the articles enumerated in the first section of the act 28 Geo. 3. c. 6. for a limited time, from the United States, for the purpose of exportation to any other of the British colonies; and all the benefits and regulations mentioned in that act in regard to the North American colonies, West India possessions, and countries bordering on the United States, we have seen are extended to Demerara, Berbice and Essequibo. (1)

These are the principal regulations of this branch of the trade between the United States and the colonies of North America. The same policy that directed our colonial system, before the independence of the United States was established, and which, we have seen, prohibited as far as practicable the intercourse of any other independent state with the British plantations, seems to have been observed with respect to America; and when we consider the propinquity of that state to our colonies, and her increasing maritime strength, it will be obvious that the utmost caution ought to be observed in introducing any relaxation of the general line of policy in this part of our navigation system.

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Having thus considered all the regulations of the navigation laws, it will now be proper concisely to inquire, what is to be deemed an "*importation*," so as to create a forfeiture within the meaning of the several enactments relating to navigation. The regulations introduced by the hovering acts relating to smuggling, will hereafter be considered. The general rule is, that the importation of goods is always accounted from the time of the ship's coming within the limits of the port, with intent to lay the goods on land (2). At a time when the importation of French goods was prohibited, a ship laden with French wines from Spain to Ireland, was driven into Plymouth by *stress of weather*, and it was submitted to the law officers whether this

(1) Ante, 240, 1.

(2) Chalmers, Col. Op. vol. 2., p. 280. The mere act of coming into port, though without breaking bulk, is *prima facie* evidence of an importation. Edwards Adm. Rep. 135. Evans' Stat. 2 vol. 659.

was an importation. Sir Robert Sawyer said, that if a ship was bound to a foreign port, but in pursuing her voyage was driven into an English port by stress of weather, it would be no importation; but if she *was bound to an English port*, or came with a design to land the goods in England, the coming in by stress of weather would not prevent the incurring of the penalties imposed for an illegal importation. Sir George Treby was of the same opinion; but declared that it was not to be extended where there was *mala fides*, and a positive intent to break the law (1). On another occasion, Sir Robert Sawyer gave a different opinion, and declared that the coming in of a ship into port in stress of weather is no importation within the act, and the intention to break the law could work no forfeiture. Mr. Constantine Phipps agreed with Sir Robert Sawyer; for, said he, an intention to break the law should not subject the ship and goods to forfeiture; for the merchants and owners might have altered their voyage, and ordered the ship to some other port; and a bare intention to break the act of parliament is not punishable, nor can the intention make any alteration in this case, in strictness of law; for the only point in issue upon the information would be, whether the goods were imported contrary to the act; and he never knew that the coming in of a ship by stress of weather was ever construed an importation. Mr. Warde and Sir Francis Pemberton held that the intention did not alter the case, and that coming in by stress of weather could *not* be an importation (2). We may therefore conclude, that the coming in by stress of weather is *no importation* under the act of navigation (3). Where a ship loaded with teas was driven into Yarmouth harbour, Sir Philip Yorke clearly held it not a case to proceed upon; he seems to have paid no regard to the circumstances which shewed the ship to be bound to Newcastle, contrary to the declaration of the master, who alleged he was bound for North Bergen (4). Where a Dutch ship was stranded on the coast of Sussex, with goods the product of Surinam, Sir Philip Yorke was of opinion that the goods might be admitted to an entry if the commissioners of the customs were satisfied they were

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(1) Reeves, 2d ed. 197.

(2) Reeves, 1st ed. 256. 2d ed. 198.

(3) To same effect, see Sir William Scott's judgment in case of Abby, 5 Rob. Rep. 251. and case of the Eleanor, Edwards Ad. Rep. 135. and post: and the case as to deviation in insurance cases, Foster and Wilmer, 2 Stra. 1249. Carter v. Roy, id. Marshal on Insurance, 1st ed. 406, 7.

(4) Ante, 176, &c. As to the importation of tea, see Pope, tit. 184. and stat. 11 Geo. 1. c. 30. s. 8. Reeves, 1st ed. 256. 2d ed. 198.

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fairly stranded, without any fraudulent intent to evade the act of navigation; for the prohibition of that act was not an absolute prohibition of the importation, but only a qualified one, as in case they were imported in ships not duly navigated, or from any place not being the place of their growth, production, or manufacture, or from the ports where they had not been usually first shipped for transportation; and stat. 5 Geo. 1. c. 11. s. 13. has declared that all stranded goods should be liable to the same duties as if they had been regularly imported. As to the frauds that might be committed under the colour of stranded goods, the commissioners might always exercise their judgment, whether it was a case where the goods should be admitted to an entry or not. (1)

Before the hovering act (2), when small vessels loaded with brandy used to come into port in the night-time in moderate weather, without any urgent necessity, Sir Edward Northey held that that would be an importation, although no bulk was broken, if such *intent* could be clearly proved; and Sir Dudley Ryder said, that the mere coming within the limits of a port, without any intent to break bulk, is not looked upon as an importation within any of the acts, either to make the customs become due, or subject the ship or goods to forfeiture, or to oblige the master to report or make an entry, or to require a coast cocket. (3)

We come now to the judicial decisions on this head, of which we shall find but few.

There was an information of seizure of goods in a ship that was twenty miles below the Hope, but within the limits of the port of London; a new trial was moved for upon a doubt, whether this could be said to be an importation? but the new trial was refused, and it was therefore concluded the court judged this to be an importation (4). Where a ship, some of the mariners of which secretly carried teas on board from Ostend to Lisbon, came to the port of Cowes to mend her bowsprit; she was seized by the officers, after which some goods were run to the sailors. The chief baron (5) held this not to be an importa-

(1) Reeves, 2d ed. 199.

(2) 5 Geo. 1. c. 11.

(3) Reeves, 1st ed. 256. 2d ed. 200.

(4) Bunbury, 79.

(5) Attorney General v. Jackson, Bunb. 236. Anno 1727. Reeves, 261. Com. Dig. Navigation, 1. 2.

tion within the act of navigation, and that such running did not amount to a forfeiture, because, after the seizure, the ship was in the power and controul of the officers; but the jury gave a verdict for the forfeiture, thinking the coming into Cowes was only a pretence, and the running afterwards declared the first intent to have been fraudulent (1). It had been usual, on the trial of informations for forfeiting goods illegally imported, to produce the master of the ship as a witness for the defendant, and no objection was made to his competency, especially if there was no information for forfeiture of the ship, till a case which happened in 1723, when it was insisted that the ship as well as goods was forfeited, and the objection was held to be good. Accordingly, in 1724, at the trial of an information on stat. 9 & 10 W. 3. c. 10. s. 3., for importing Indian silks, the master of the ship being offered as a witness for the defendant, he was refused by lord chief baron Eyre, because, although no prosecution had yet been commenced, he was liable to one (2). In the case of Idle v. Vannech (3) it was contended for the defendant, who was prosecuted for bringing goods from Rotterdam, not being the place of their growth, that the goods were brought either by the passengers or the mariners, without the knowledge or privity of the master; and it was hard to subject the master, and much more the owner, to a loss for a cause of forfeiture which they could not prevent; and they relied on stat. 27 Edw. 3. c. 19. and stat. 38 Edw. 3. c. 8. But lord chief baron Pengelly said, his present thoughts were, that knowledge in the master was not necessary, for the act is an express prohibition, without any limitation or qualification, and the fact proved came directly within the description of the act; the forfeiture was upon the goods themselves, and not upon the person: the intention of the law was to support trade, and therefore it might be presumed all persons would take the utmost care trade should be carried on without fraud: the owner is to take care what master he employs, and the master what mariners and what passengers he takes in; and being "*exercitor navis,*" and having the entire controul of the ship, he may search and examine when and where he will: no damage accrues to the owner, for he may recover against the master for the forfeiture of the ship, accruing by his default; and (as he thought) the master might recover against a passenger who caused a forfeiture; there is more

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(1) Anno 1727.
(2) Bunbury, 140.
(3) Bunbury, 238. Com. Dig. Navigation, I. 2. Evans' Stat. 2 vol. 661. n. 5.

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reason the owner should suffer, as he had benefit of the freight which occasioned the forfeiture; the master is to report, and therefore is obliged to see what he does report. Such was the opinion delivered by the chief baron, though he meant to reserve the point for the opinion of the court; but it turned out not to be necessary, for the jury found that the defendant *had* actual knowledge of the fact. On a motion for a new trial, all the barons agreed in opinion, that notice in the master was not necessary to create a forfeiture upon this act, though, for a small matter, they thought it hard a ship should be condemned. These are the words of the act 38 Edw. 3. c. 8., of which it is much doubted whether it be not repealed. On a subsequent occasion (1), in 1733, this distinction was made upon the point by lord chief baron Reynolds, namely, Whether the goods so brought were or were not part of the cargo? and therefore, if mariners or passengers *privately* bring over a *small parcel* of goods, they are not to be looked upon as part of the cargo, and it would be hard the ship should be forfeited for such a cause. This question was again moved in 6 Geo. 3. in Mitchell v. Torup (2), being an information on the fourth section of the act of navigation for the importation of 221 lbs. of tea from Norway, which were found by the jury to have been put on board by the mariners without the knowledge, privity, or consent of the master, mate, or owners; and chief baron Parker observed that the words of the act in the first, second, third, and fourth sections were all equally negative, absolute, and prohibitory; they operate both on the goods and the ship, and there is not a syllable that hints at the privity or consent of the master, mate, or owners: the reason of penning the section in such strong terms was to prevent as much as possible its being evaded; for if the privity or consent of the master, mate, or owners had been made necessary, the provisions of the act would have been defeated. That it also appeared that the twelfth, thirteenth, and fourteenth sections did not contradict but enforced the words of the fourth clause; and that when the whole act was under the consideration of the legislature at several subsequent periods, as at the times of making stat. 14 Geo. 2. c. 36., 17 Geo. 2. c. 36., 25 Geo. 2. c. 32., no relaxation, to make the privity or consent of the master, mate, or owners necessary to

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(1) Bunbury, 232. Reeves, 264. Com. Dig. Navigation, I. 2.

(2) Parker, 227; and see Attorney General v. Jackson, Bunb. 236. Com. Dig. Navigation, I. 2.

forfeiture, took place. As to the objection made by the defendant, that the penalty imposed by the fourth section only applies where there is some crime or guilt, and none can be imputed to the master, mate, or owners without their privity, he answered, that though penalties and forfeitures, generally speaking, are the consequence of some crime or guilt, yet neither of them necessarily imply the one or the other, though punishment always does: as in case of the sword of an innocent man being forfeited if murder committed with it; so of deodands; so of horses of innocent owners upon which robberies are committed, forfeited by stat. 4 W & M c. 8.; so, under the revenue laws, the forfeitures of boats, carriages, horses, cattle, and other things: and by this fourth section, the forfeiture is not upon the person but on the ship, not in *personam* but in *rem* (1). Informations were also constantly drawn without alleging privity; and as more need not be proved than laid, the finding of the jury that the importation in question was without the privity of the master, mate, or owners, was nugatory and void, not being comprised in the issue. The navigation act, he observed, had altered the 38 Edw. 3 c. 8., which protected ships from forfeiture for small things put on board without knowledge of the owner, by an express prohibition, without restriction or limitation, as most effectual means of preventing the mischief to ensue; and by stat. 9 Geo. 2. c. 35. 3 Geo. 3. c. 22. s. 5. 5 Geo. 3. c. 43. such small quantities as 6 lbs. and 20 lbs. were sufficient; though no quantity so small as not to be found by reasonable search, neither would nor ought to create a forfeiture, *de minimis non curat lex*. He gave a like answer to the objection rested on 27 Edw. 3. c. 19., that no merchant should forfeit his goods for trespass and forfeiture of his servant; that the navigation act was subsequent to it, and that the owner must take care what master, and the master what mariners were employed. He also cited the uniform authorities of chief barons at *nisi prius*, in Foster v. Philips, C. B. Montague, in 1722; C. B. Gilbert, in Gatehouse v. Ayroch, Trinity 1725; and of C. B. Pengelly, in Idle v. Vannech (2), before mentioned, where the barons agreed with him on a motion for a new trial, and in which case the 27 & 38 Edw. 3. were cited. He noticed the distinction made by C. B. Reynolds, as to the goods being a part of the cargo or not; and recognised it, though he considered the quantity in this case not so small as to allow its adoption.

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(1) Reeves, 267. (2) Ante, 247.

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On the subject of the repeal of those saving statutes, 27 Edw. 3. c. 19. and 38 Edw. 3. c. 8., much doubt still exists; but indeed from the absolute wording of the clauses in the act of navigation, and the subsequent statutes, as well as from the general policy of such a repeal, it seems to favor the opinion that these acts of Edward 3. are now in force. Mr. Reeves observes, that "notwithstanding these judgments against the application of the statute 38 Edw. 3. c. 8. to the act of navigation and other acts passed since; it seems now to be the prevailing opinion that this statute is not repealed by subsequent acts, however absolute in their prohibition; and that it ought to have its influence in construing cases of forfeiture. But that the statute 27 Edw. 3. c. 19. is not considered in the same light; instances frequently occur where forfeitures arise from the conduct of a servant; but to allow this as a plea, would open a door to all sorts of fraud. The opinion of the custom-house on these laws may be inferred from the collection they have printed of the laws of the customs which they conceive to be in force; they have inserted the statute 38 Edw. 3., but statute 27 Edw. 3. they have excluded (1)." The statute 27 Edw. 3. is also omitted in Mr. Pope's collection (2), and this therefore may be inferred to be the opinion of the custom-house. On what ground one of these statutes should be considered repealed, and the other not, does not appear; the provision in the statute 27 Edw. 3. is that no merchant should forfeit his goods for the trespass and forfeiture of his servant; and the provision of the statute 23 Edw. 3. is, no owner shall lose his ship, for a small thing put therein, not customed, without his knowledge; now these provisions are in fact the same, and their operation alike, except that the last is more general than the former. If my servant puts on board any vessel prohibited goods, my ship shall not be forfeited; and if a passenger by my ship puts on board a like article, my ship shall not be forfeited: the one is saved by the act 27 Edw. 3. and the other by the act 38 Edw. The 27 Edw. 3. might perhaps be considered virtually repealed by the general wording of the act 38 Edw. 3.; and if so, why should not the act 38 Edw. 3. be placed on the same foundation, and be considered virtually repealed by the general and absolute wording of the act of 12 Car. 2. c. 18.; and the following case may by analogy be considered as in some measure applicable to importation. This was the case of the Attorney General v. Pongett, in the

(1) Reeves, 2d ed. 207. See also Evans' Statutes, 2 vol. 659. n. 1.

(2) Pope, tit. 2. rule 2.

Exchequer (1); on a question concerning the payment of export duty, Baron Wood gave it as his opinion that the goods shipped could not be considered as exported, until the ship had cleared the limits of the port; Baron Richards was of the same opinion, and judgment was given for the Crown. And in a late case it was held, that though unlading and putting on shore contrary to the navigation act respecting trade with the colonies, is necessary to complete a forfeiture, yet a voyage with the intent to violate the law, being illegal, a policy on the ship engaged in it is void. (2) What is an Importation.

It is an established doctrine in the custom-house, that general prohibitions upon trade did not operate with respect to goods taken as *prize*. In consequence of this, it is the practice when goods have been condemned as prize at Gibraltar, in Ireland, or in any of his Majesty's dominions abroad, to permit them to be imported into England, if brought hither from those places in the common way of trade; and the duties have in such cases been permitted to be taken, even where the goods, though condemned, were discharged by a sentence of reversal. But in a case where an East India ship of great value had been captured and carried into Ireland, the commissioners, before they allowed the importation, wished to have the opinion of the law officers: when Mr. Henley declared it to have been established upon very solid grounds, that the acts prohibiting importation of particular commodities are applicable only to importations in a course of trade; and he held that English merchants purchasing the cargo of this ship in Ireland, might import it into England, as they would stand in the place of the captors, and the commissioners were not justified by any law, either regarding the nation in general or the East India company in particular, in refusing to permit the importation and entry of such a cargo. Where a prize ship laden with sugars was carried into Montserrat, to be condemned, and was from thence, without unloading, carried into Antigua; this was held by Sir Dudley Ryder not to be such an importation at Montserrat as to subject the sugars to the duty imposed on the importation of such sugars into that island (3). Thus far may prize goods be considered, upon general reasoning; but a shorter answer to such question is, that prize goods are specially excepted by sect. 15. of the act of

(1) 2 Price's Reports, 381. Pope, Navigation, tit. 1.

(2) Lubboch v. Potts, 7 East, 455, 6.

(3) Reeves, 2d ed. 199.

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navigation, which provision is not referred to in any of the law opinions on this point: yet where goods, the product of a British plantation, were taken prize by the French and carried into France; and the merchants in England, to whom they had been consigned, meant to purchase them, if they could be permitted afterwards to import them; Sir Dudley Ryder held, that however reasonable this might be in itself, the act of navigation was so plain upon the point, that if those goods should be imported from France, they would in his opinion be forfeited, and the commissioners' licence or warrant to admit them to an entry, as was proposed, would not dispense with the forfeiture.

Of the Regulations respecting British Shipping and British Mariners.

Every provision which we have hitherto noticed, has for its object to enforce some or all of these three requisites: that the ships employed be British owned, British built, and British navigated; requisites that appear essentially necessary to be enforced, in order to preserve the real prosperity and strength of a trading nation, such as Great Britain. Therefore it will now be necessary to ascertain what the phrases British *owned*, British *built*, and British *navigated*, are legally understood to signify.

British owned.

A ship is considered as British owned when it belongs to some of his Majesty's subjects in Great Britain, Ireland, Jersey, Guernsey, or the Isle of Man, or some of the king's colonies, plantations, islands, or territories in Asia, Africa, or America (1); but no subject whose usual residence is in any country not under the dominion of his Majesty, is to be deemed a British subject for this purpose during such residence, unless he be a member of some British factory, or agent for or copartner in a house or copartnership actually carrying on trade in Great Britain or Ireland.

Of the necessity for the Vessel being *British-built*.

We have seen that in the earlier stages of our navigation laws, numerous advantages were enjoyed by vessels British *owned*, though they were not *built* in this country, or as it is termed *British-built*; and ship-building was not sufficiently advanced to justify the legislature in confining the privileges of British ships to those vessels built in this country. But in the last century the great increase of our shipping rendered it expedient to adopt such a measure; and it was accordingly enacted by the 26 Geo. 3. c. 60. s. 1., that no ship or vessel foreign-built (ex-

(1) 26 Geo. 3. c. 60. s. 8.

cept vessels taken and condemned as lawful PRIZE), nor any ship or vessel built or rebuilt upon any *foreign*-made keel or bottom, in the manner heretofore practised, although owned by British subjects and navigated according to law, shall be entitled to any of the privileges or advantages of a British-*built ship*, or of a ship owned by British subjects; and that all the said privileges and advantages shall hereafter be confined to such ships only as are *wholly* of the *built* of Great Britain or Ireland, *Guernsey*, *Jersey*, and the *Isle of Man*, or of some of the colonies, plantations, islands, or territories in Asia, Africa, or America, which now belong, or at the time of building of such ships or vessels did belong, or which may hereafter belong to or be in the possession of his Majesty, his heirs or successors. And the second section excepts from such privileges and advantages such British-built ships as shall be rebuilt or repaired in any foreign port or place to an amount exceeding fifteen shillings per ton, unless such repairs shall be proved to have been necessary to enable the ship to perform her voyage (1). By a more modern statute, however, the construction of the phrase *British shipping* has been a little enlarged; for the statute 37 Geo. 3. c. 63. s. 1. recites, that in consequence of articles of capitulation, whereby certain foreign colonies or settlements, or parts thereof, have been or may hereafter *be surrendered* to his Majesty during the *present war*, certain foreign ships and vessels may have been put or may be put under his Majesty's protection, enacts, that all foreign ships and vessels which in consequence of any such capitulation shall have been or may be so put under his Majesty's *protection*, at the time of or in consequence of the surrender of any foreign colony or settlement, or part of any foreign colony or settlement to his Majesty, shall and may be registered in like manner as ships taken and condemned as lawful *prize* may, by the laws now in force, be registered, and shall by virtue thereof become entitled to the privileges and advantages of British ships or vessels, under the regulations and restrictions herein-after mentioned. Then follow certain provisions as to the *mode* of registering. And the third section enacts, that it shall be lawful for any such ship or vessel *being registered*, and having a certificate of registry as aforesaid, and being navigated as British ships are now or may hereafter be required by law to be navigated, to import and export to and from any place and places *whatsoever*, such goods and merchandizes respectively, and none other, as may be im-

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(1) Reeves, 2d ed. 429, 430, 508.

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ported and exported by any ship or vessel taken and condemned as lawful *prize*; such importations and exportations to be made in like manner, and under and subject to the like duties, conditions, regulations, and restrictions, and subject to the like penalties and forfeitures for the breach thereof, as if the same were made by any ship or vessel taken and condemned as lawful prize: provided always, that such ships and vessels so put under his Majesty's protection shall not be allowed to import or export any goods whatsoever to or from any port in Europe not in the possession of his Majesty. In all other respects these vessels appear to be in the same condition with *prize ships*, which by the stat. 33 Geo. 3. c. 66. s. 45. are to be deemed *British-built*.

Registry.

Various acts have from time to time been passed enjoining the *registry of vessels*, a form without which no vessels above a certain burthen can obtain the rights of British ships. But as these acts are matter of merely *municipal* regulation, and do not immediately affect the commerce of *foreigners*, we will not here particularize them (1). The stat. 27 Geo. 3. c. 19. s. 19. enacts, that all ships not entitled to the privileges of a British ship, or of a ship owned by British subjects, before the 1st of May 1786, and all ships not duly registered, shall, although such ships and vessels may be *owned* by his Majesty's subjects, be held and deemed to all intents and purposes as alien ships. But there is one exception which deserves to be noticed, introduced by the 35 Geo. 3. c. 115.; the words are as follows: "Whereas the court of directors of the united company of merchants of England trading to the East Indies, with the approbation of the board of commissioners for the affairs of India, have sent instructions to their presidencies in the East Indies *to take up* such proper ships as they can procure for sending home investments of goods from India and China, and other parts within the limits of the said company's trade, in the place of those usually sent from this country to India and China for that purpose, which last-mentioned ships now are or may be engaged in the public service: and whereas the ships so to be taken up may not *be British-built*, or have been registered as such, and may not be navigated as required by the laws now in force;" be it enacted, "that if during the continuance of the present war, and for eighteen months after the conclusion thereof, any such ship shall arrive in the ports of this kingdom freighted with goods in the manner

(1) See summary, Reeves, 2d ed. 509—511; and see decisions upon them, Reeves, 2d ed. 464, &c. Abbott's Law of Shipping.

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and from any of the places within the limits before mentioned, it shall and may be lawful, upon representation made by or on behalf of the said company to his Majesty in council, for his Majesty, by and with the advice of his privy council, to *authorize* the importation and entry of such goods, subject to the *like duties* and no other as if they were imported in British-*built* ships, though such goods shall be brought in ships which may not be British-built, nor have been British-built ships, nor navigated as required by the laws now in force; provided the said ships shall have been built within the territories belonging to the said united East India company, or the ports under the immediate protection of the British flag in the East Indies; and also to permit such ships to export from this kingdom to the British settlements in the East Indies, or to any of the places within the limits before mentioned, with the licence and consent of the said company, any goods, wares, or merchandizes whatsoever, ordnance and military stores excepted; any law, usage, or custom to the contrary thereof notwithstanding." This act extended only to the expiration of eighteen months after the conclusion of the war; but by 42 Geo. 3. c. 20. its provisions were continued during the continuance of the exclusive trade to the East Indies granted to the company by 35 Geo. 3. c. 52. (1)

'On the whole, as the exceptions during *war* are in their nature but temporary, we may consider the general law as to British ownership and British-built to be this: That a vessel, in order to be entitled to any of the advantages of a British ship, must be the property of the king's subjects in Great Britain or Ireland, Guernsey, Jersey, or the Isle of Man, or in some of the colonies, plantations, islands, or territories in Asia, Africa, or America, belonging to or in the possession of his Majesty: further, it must have been built in some of the dominions last enumerated, unless it be a prize vessel legally condemned, or a vessel put under his Majesty's protection by any capitulation at the time or in consequence of the surrender of any foreign colony or settlement to his Majesty; in which case, however, such vessel cannot import or export any goods to or from any port in Europe not in his Majesty's possession: finally, the forms required by the register acts must have been duly observed.

(1) As to the East India trade, see ante and post.

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British navigated.

A ship thus far qualified (that is to say, a ship which, according to the statutes, is to be deemed *English owned* and *English built*) *needs* yet another requisite to complete her immunity: she must be not only British owned and British-built, but *British* navigated also. The stat. of 12 Car. 2. c. 18. wherein it requires a trading ship to be either English owned or English built, requires also that *the master and three fourths of the mariners be subjects of the king:* and the stat. of 13 & 14 Car. 2. c. 11. s. 6. explains that the *number of mariners* are to be accounted according to what they shall have been during the whole voyage (1). By the stat. 34 Geo. 3. c. 68. (2) it is enacted, that whenever *that* or any other act requires that the master and the whole or any proportion of the mariners shall be British subjects, they must be so *during the whole voyage,* unless in case of *sickness, death, desertion,* of the whole or part of the crew being taken *prisoners* in the voyage; and in order to prevent doubts, the same statute in the 7th section enacts, that all foreign mariners who shall have served or who shall serve on board any of his Majesty's ships or vessels of war in time of war for *three years,* and who shall have obtained from the commanding officer certificates testifying that they have so served, and testifying also their fidelity and good behaviour during such service, and who shall have taken the oath of allegiance, and complied with certain forms particularly mentioned by the act, shall be entitled to be employed as masters of British ships or vessels, or as British mariners, on board any British ships or vessels, within the intent and meaning of any of the laws in force at the time of the passing of that act: but the act in the 8th section excludes from the power of obtaining this qualification every person, however otherwise qualified, who after he has become qualified has taken or shall take the oath of allegiance to any *foreign sovereign* or state, for any purpose, except under the terms of some capitulation upon a conquest *by an* enemy, and for the purpose of such qualification only. At the same time the same section permits that in the navigation on the seas of America and the West Indies, *from* any port of America and the West Indies *to* any port of America and the West Indies, any *negroes* belonging to any person or persons being or having become his Majesty's subjects in manner aforesaid, and with

(1) Reeves, 2d ed. 341. 459. 511.

(2) See this statute observed upon, Reeves, 2d ed. 459—462.

the qualifications aforesaid, and in the seas to the eastward of the Cape of Good Hope, from any port to the eastward of the Cape of Good Hope to any other port to the eastward of the Cape of Good Hope, Lascars and other natives of any of the countries to the eastward of the Cape of Good Hope, may be employed as *British* sailors, seamen, or mariners, in manner *heretofore* practised. There is, however, a provision, in its nature *temporary*, against the employment of *negroes* from the colonies then lately belonging to the French king, except under certain conditions. The 12th section enacts, that in case any British ship shall be found at sea, having on board a greater number of foreign mariners than is allowed by this act, or any law now in force or hereafter to be made, and the master of such ship or vessel shall produce a certificate of the actual necessity of engaging such foreign mariners in some foreign port, by occasion of the sickness, death, or desertion of the like number of British mariners, or of the same having been taken prisoners during his voyage, and that British mariners could not be engaged in such foreign port to supply their room, and that for the safe navigation of such ship or vessel it became necessary to engage and employ such foreign mariners, under the hand of his Majesty's consul at the foreign port where the said foreign mariners were so engaged, or, if there is not any such consul there, under the hands of two known British merchants at such foreign port, it shall not be lawful for any of the persons authorized by this act to make seizures of ships or vessels navigated contrary to the directions of this act, to stop or detain any such ship or vessel so found at sea, or to hinder her from proceeding on her voyage, but such persons shall and are hereby required to indorse the certificate so produced, testifying the production thereof, and when and where met with at sea, and that the number of foreign mariners correspond with the certificate of such British consul, or such known British merchants, for the consideration and investigation of the commissioners of his Majesty's customs in England and Scotland respectively.

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The stat. 13 Geo. 2. c. 3. s. 1. & 4. contains a proviso enabling the king, at all times when it shall be found necessary to declare war against any foreign power, to publish a proclamation to permit all merchant ships and other trading vessels and privateers to be manned with foreign mariners and seamen during such war, so as the number of such foreign seamen or mariners do not exceed three-fourths of the mariners at any one time em-

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ployed to navigate such merchant ship, or other trading ship or vessel, or privateer; and that one-fourth at least of the mariners or seamen so employed be at all times natives, or his Majesty's naturalized subjects of Great Britain; sudden death, and the hazard and casualties of war and the seas, saved and excepted: and this right is reserved to the king by 33 Geo. 3. c. 68. s. 9.

Since the union of Great Britain and Ireland, regulations similar to those which we have noticed have been made by the legislature with respect to the navigation of *Irish* ships by subjects of the United Kingdom (1). We have already stated the decisions and opinions upon questions whether the ship has been navigated by the proper person. (2)

Consequence of Ship being partly owned by a Foreigner.

We have seen, that a vessel of which a *foreigner* is part owner, is excluded, in certain branches of trade, from the privileges of a British ship, though it be British-built and British navigated. Whenever, therefore, a foreigner purchases a share in a vessel, the shares of the other owners, of course, become materially prejudiced. To remedy this evil, it was enacted by the 34 Geo. 3. c. 68. s. 20., that no foreigner, or other person or persons whatsoever, not being a natural-born subject of his Majesty, his heirs or successors, shall be entitled to, or purchase or contract for, any part or parts, share or shares, of any British ship or vessel whatsoever, belonging only to natural-born subjects of his Majesty, his heirs or successors, without the consent, in writing, of the owner or owners of three-fourth parts in value, for that purpose first had and obtained, and indorsed on the certificate of the register of such ship before two witnesses; and all agreements, contracts, purchases, and sales of any part or share of any British ship or vessel, belonging only to natural-born subjects of his Majesty, his heirs or successors, made, entered into, contracted for, or concluded by any such foreigner, or other person or persons not being a natural-born subject or subjects of his Majesty, his heirs or successors, without such consent first had and obtained and indorsed as aforesaid, shall be and are hereby declared to be absolutely null and void, to all intents and purposes whatsoever.

Policy of the Navigation Acts, and of the Suspensions during War.

It now remains only to add a few observations upon the general policy of the acts of navigation; various, indeed, and difficult to be digested, but concurring and combining, throughout all

(1) 41 Geo. 3. c. 95. 42 Geo. 3. c. 61. Reeves, 2d ed. 462.

(2) Ante, 187.

their numerous and complicated ordinances, to the one great object of enlarging and strengthening the *maritime* power of *Great Britain.* Dr. Smith (1) observes, that there are two cases in which it will generally be advantageous to lay some burden upon *foreign*, for the encouragement of *domestic* industry. The first is, when some particular sort of industry is necessary for the DEFENCE of the country. The defence of Great Britain, for example, depends very much upon the number of her sailors and shipping; the act of navigation, therefore, very properly endeavours to give the sailors and shipping of Great Britain the monopoly of the trade of their own country, in some cases by absolute prohibitions, and in others by heavy burdens upon the shipping of foreign countries. When the act of navigation was made, though England and Holland were not actually at war, the most violent animosity subsisted between the two nations. It had begun during the government of the long parliament, which first framed this act, and it broke out soon after in the Dutch wars, during that of the Protector and of Charles the 2d.; it is not impossible, therefore, that some of the regulations of this famous act may have proceeded from national animosity. They are as wise, however, as if they had been all dictated by the most deliberate wisdom. National animosity, at that particular time, aimed at the very same object which the most deliberate wisdom would have recommended, the diminution of the naval power of Holland, the only naval power which could endanger the security of England. The act of navigation is not *favourable* to *foreign commerce*, or to the growth of that opulence which can arise from it: the interest of a nation, in its commercial relations to foreign nations, is like that of a merchant with regard to the different people with whom he deals, to buy as cheap and to sell as dear as possible; it will be most likely to buy cheap, when, by the most perfect freedom of trade, it encourages all nations to bring to it the goods which it has occasion to purchase; and, for the same reason, it will be most likely to sell dear, when its markets are thus filled with the greatest number of buyers. The act of navigation, it is true, lays no burden upon foreign ships

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(1) 2 Smith's W. N. 212. The good policy of these regulations is also admitted by Savary, see Beawes, 5th ed. 16, 17, 6th ed. 20. 2 Adolphus, 226. Id. vol. 3. 163, 4. See Reeves, 2d ed. 519—524. Marriott's Case of the Dutch Ships. Collection of Reports, &c. on Navigation Law, A. D. 1807. Lord Sheffield's Work, intituled "Strictures on the Necessity of inviolably preserving the Navigation and Colonial System of Great Britain." Sir Josiah Child on Trade, Preface.

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that come to *export* the *produce of British* industry: even the ancient aliens duty, which used to be paid upon all goods exported as well as imported, has, by several subsequent acts, been taken off from the greater part of the articles of *exportation*. But if foreigners, either by prohibitions or high duties, are hindered from coming to *sell*, they cannot always afford to come to *buy*; because, coming without a cargo, they must lose the freight from their own country to Great Britain. By diminishing the number of sellers, therefore, we necessarily diminish that of buyers, and are thus likely not only to buy foreign goods dearer, but to sell our own cheaper, than if there was a perfect freedom of trade. As *defence*, however, is of much more importance than *opulence*, the act of navigation is, perhaps, the wisest of all the commercial regulations of England. (1)

Experience, says Mr. Reeves (2), has shewn the advantage of adhering to this maritime policy. The inducement and obligation to employ British ships had the effect of increasing their number. The increase of their number became a spur to seek out employment for them. Foreign trade and the fisheries were, by various expedients, made subservient to advance the interest of shipping. Trade and shipping thus reciprocally contributed to advance each other; and thus combined, they constituted very considerable sources of national wealth. Having been at first encouraged for the sake of the navy, they were afterwards encouraged for their own. From being subordinate and auxiliary to another object, they are now become principal objects themselves in the national policy; and, in the mean time, the naval power of the country is sure of supply and support, without being directly in contemplation. This action and re-action between shipping and trade has ever been promoted by the effects of naval armaments. It has been found, that after the conclusion of a war, there has constantly been a great increase of mercantile shipping. This has been caused, first, by the government having employed, during the war, a number of transports, which has induced the merchants to invest their money in the building of ships for that service: secondly, the privateers which were fitted out during hostilities, having no employment at the peace but the merchants'

(1) M. Savary, a celebrated French author, observes upon the sound policy of the English navigation act, and urges his own countrymen to adopt similar regulations. See Beawes, Lex Mercatoria, 5th ed. 16. 6th ed. 20.

(2) Law of Shipping, 1st ed 543. 2d ed. 520.

service, transports and privateers fall into foreign trade or the fisheries; and in this manner does the service of the navy pay back to trade and navigation the obligations it had before received. If the wisdom of any scheme of policy is to be measured by its effects and consequences, our navigation system is entitled to the praise of having attained the end for which it was designed. Whether we regard the primary or inferior objects in this system; whether it is the increase of shipping, the extension of our foreign trade, or the strength of our navy; they have all advanced to a degree of consideration unexampled, and they owe that advancement to this excellent system.

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It has been well observed (1), that according to circumstances of various times, the operation of the navigation acts has been partially suspended, and the benefits of a free commerce with Great Britain and her colonies allowed for limited periods to other nations. During the late war also, several acts were passed directly militating against the navigation laws, which are thus enumerated and remarked on by Lord Sheffield:—" The law commonly known by the name of the Dutch property act, and which very much extended the privileges of neutral bottoms, was passed in the 35 Geo. 3. for the avowed purpose of securing the property of the Dutch emigrants; this act, though temporary in its object, laid the foundation of and furnished the pretence for the subsequent acts, by which such objectionable and unnecessary powers were given to privy councils. In the next year the 36 of Geo. 3. c. 17. was passed giving power to the privy council to permit all vessels under the same pretence to bring from any country goods of any sort, which, according to the navigation laws, could be imported only by British ships duly navigated, or by ships, also duly navigated, of the countries whence the goods were brought. According to this law all merchandize imported in foreign ships was to pay no duty until taken out of the warehouse for consumption, though the like merchandize, if brought in British vessels, was charged with duty immediately on importation. Here, then, was a manifest injury to the British merchants; yet, if British ships had been

(1) Lord Sheffield's Work, " Strictures on the Necessity for inviolably preserving the Navigation and Colonial System of Great Britain." Alley's Vindication of Lord Sheffield's Strictures, 16 to 22. 3 Adolphus, 166. Reeves, 2d ed. 518. Collection of Reports and Papers published by Society of Ship Owners of Great Britain, 1807, per tot.

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permitted to enter their goods under the same power, there would have been still greater mischief in the regulation; for in such case we should have had no British ships duly navigated, or at least those which were not duly navigated, and foreign vessels, would have still enjoyed superior advantages, because they could have more easily completed the crews and at lower wages. These acts of the thirty-fifth and thirty-sixth were further continued by the acts of the thirty-ninth and fortieth of the king, until the 1st of January 1804, and finally an act was passed in the forty-second of the king, to terminate also in the year 1804, for repealing these several acts, or such of them as had not been previously repealed, and for enabling the privy council to permit goods to be imported in ships of any country of not less than 100 tons, or in British ships navigated according to law, from any part of America or the West Indies not under the dominion of his Majesty. For these laws (Lord Sheffield proceeds) there was not even a pretence, but such as referred to temporary circumstances. During the then late war, when, in consequence of the disturbed state of the greater part of the two hemispheres, a very considerable portion of the produce of the world was likely to be brought into this country for safety or for a market, it was thought advisable, for the present, to suffer all goods to be imported in neutral ships, and a large importation took place of the product of the countries at war as well as of neutral nations, and the goods were permitted to be warehoused, both for home consumption and re-exportation. But although these laws may have arisen in the whole or in part from such principles or such pretences, they are not therefore to be vindicated. Some of them afforded great advantages to foreign ships, in permitting articles of merchandize to be stored, which they did not allow to British ships; and all of them in principle obviously amounted to a complete suspension of an essential part of our navigation code, and were admitted through laxity of principles and want of perception of the true spirit of that system. They were favoured indeed by the idea that merchandize could not be brought into this country without leaving something behind on re-exportation. But here ends the apology which is to be offered for them; and why any of them should have been allowed to continue in force after the peace, and till 1804, it will not be easy to assign a reason. These acts, if they augmented the quantity of merchandize brought to this country, certainly increased, in a very unnecessary degree, the quantity of foreign tonnage employed in our carrying trade; and all the advantages thus held out to foreign shipping

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were peculiarly calculated to establish that trade in the hands of the Americans on the conclusion of the war, when such a number of transports, and so many ships, seamen, and artificers, were to be discharged from the public service, as would be fully equal to the carrying on of the whole of our commerce. Under such circumstances, therefore, what was to be the probable result? Those ships were to be laid up by discouragement in our ports to rot; and those seamen, together with the numerous classes of persons occupied in ship-building, were to be dispersed abroad in search of employment, and many to be seduced into the service of other nations, or to pass over to America, and consequently they and their progeny to be lost to their native country for ever.

Following the same line of argument with the noble author, and adopting many of his calculations and deductions, Mr. Oddy forms the following conclusion: The necessity and policy of suspending the British navigation acts can be justified in time of war only; then it is a source of profit to foreign nations at the expence of Great Britain: but if we are to judge of the prosperity of the country from past experience, that it can support great burthens, it is the shipping which is the fundamental cause of our bearing those burthens; and therefore it appears policy to exempt British shipping from taxation as a source of revenue. We should consider that though the goods can bear a tax, the carrier may not be able to do so; and when the question is about the nation being its own carrier, matters should be managed not only with great delicacy, but with great liberality; for any tax upon our shipping acts as a premium to foreign shipping, consequently prejudicial to our own. It has always been a maxim of nations, and a just one too, that individual prosperity should give way to the welfare of a state; but where both can be materially benefited, then policy commands that we should secure those advantages. The navigation act of this country is the foundation on which the colossal monument of our naval victories, glories, and national power, is built; and although our superiority has been so much exclaimed against by all, a French author, the most conspicuous in the ranks when issuing his splenetic envy against Britain exercising the sovereignty of the seas, has candidly asked, "What nation, having the power, would not do the same?" When, then, our existence as a great and powerful na-

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tion depends upon our navy, and when our shipping is a nursery for that navy, every protection and facility should be given to promote it; every restraint or burthen to discourage it should be done away. It is a floating insecure property of individuals, always precarious and liable to loss; it therefore requires the fostering aid of government, when we have near us at home, competitors like the northern nations; and across the Atlantic the Americans, whose enterprising spirit and vigilance is making head in a more formidable manner than we are aware.

CHAP. VII.

Of the Fishery Laws.

WE now come to the consideration of the regulations respecting the *fisheries*. These have been properly treated as a branch of the navigation system (1), but the great importance of the subject renders it expedient to give them a separate and distinct enquiry. Next to the advancement of agriculture, the improvement of the fisheries is of the greatest national concern; they constitute the second natural resource for the means of subsistence, and upon their increase greatly depends the ability of extending and comfortably supporting the population of this kingdom (2). It has been well observed, that in every country where the coasts lay favourably for the fisheries, their encouragement has been found to be an object of high importance; it increases the quantity of food, it brings up a hardy race of people, and it is a great source of wealth, by supplying such nations as have not themselves the means of catching fish, and of private emolument to the numerous artisans necessary to the fitting out of the vessels and implements used in them. To Great Britain, an island circumscribed in extent, and therefore limited in point of subsistence and population which depends on the means of subsistence, the encouragement of fisheries is a peculiar object of importance, and ought to be one of particular solicitude; its defence too in time of war depending on its naval power, increases the importance of that source of wealth, and therefore in more views than one the fisheries are fit objects for public bounties (3); and even the celebrated writer on the Wealth of Nations, who in general expresses himself adverse to interference by governments in the trade and commerce of individuals, yet allows that fisheries are an exception; that their encouragement is a national benefit, and therefore their extension ought

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(1) Reeves's Law of Shipping.
(2) Ante, 1 & 2.
(3) Oddy on Fisheries. 3 Adolphus, Pol. St. 277. Ante, 1 & 2.

to be an object for bounties and encouragement at the expence of the public (1). It is also observed in Lords Somers' Tracts (2), that in the grand object of providing with food the human race, which the immutable principle of population itself finds it difficult to keep from an overflow, fisheries occupy a no less considerable place than that of second to agriculture. Philanthropy delights to look forward to that improvement in them so much expatiated upon, so ardently pursued, and hitherto so little attained, for the numbers which would be so rapidly added to mankind, if such an inexhaustible means of support was regularly afforded. Not only does this agriculture of the ocean, as Dr. Franklin terms it, increase the quantity of provisions, but from the numerous and hardy race of men required to follow the trade, it becomes the nursery of the best seamen (3). That skill in navigation, cool bravery, and determined steadiness in action, and that unbending endurance of fatigue and privation, so conspicuous in the navy of England, may in many an instance be referred for their origin to a boyhood spent in the difficulties and hardships of the Northern herring fisheries, where, says Mr. Knox (4), the moment a vessel spreads her sails, she launches into a labyrinth of difficulties, dangers, and hair-breadth escapes; she must navigate in every direction and to every point of the compass, at all times, through rapid currents and jarring tides, and frequently amidst storms and tempests. No sooner hath she doubled one cape than another appears, which the men, already fatigued and worn out, must also encounter, and thus are kept in continual motion, terror, and alarm. These outward and homeward voyages, the various cruises from bay to bay, and from one island to another, in search of the herrings, form the hardy experienced seamen so highly valued in the mercantile service and the Royal navy. The example of Holland, whose riches and edifices, it has been observed, may be said to have risen from the British deep, has employed some of the ablest pens in this country to rouse us to a sense of our more advantageous local situation. The circumscribed extent of the two countries in proportion to their respective population, is another point of comparison in which, if Great Britain has

(1) 2 Smith, 279. 3 Adolphus, 278.

(2) Lord Somers' Tracts, vol. 12. p. 47.

(3) Lord Somers' Tracts, vol. 12. p. 47.

(4) Knox's History of the Herring Fisheries, vol. 1. p. 241. 3d edition.

the advantage, it should the more awaken her solicitude to the yet infant state of her fisheries (1); and it has been remarked by the able author of the Political State of the British Empire, that the former difficulties relative to our fisheries appear by the present political state of Europe to have been dispelled, and that it behoves us to take the proper measures now to avail ourselves of the advantages which combined circumstances have afforded to Great Britain (2). The man who should bring to perfection a more improved system of fishery regulations, would deserve the gratitude of his country.

It is proposed to consider the law and regulations respecting fisheries under the following heads, as they respect, *First*, fisheries *in general*. *Secondly*, the *herring fisheries*. *Thirdly*, the *whale fisheries*. *Fourthly*, the *Newfoundland fisheries*; *Fifthly*, the mackarel, oyster, salmon, pilchard, and other fisheries; and *Sixthly*, the fisheries in harbours, navigable rivers, &c.

I. Concise History and general view of the Law and Regulations relative to the Fisheries (3).

Such has been the favour shewn to this source of subsistence, that even during war, when an enemy's property of every description is generally subject to seizure, it has been usual to make an exception from capture in favour of small fishing vessels, from tenderness to a poor and industrious order of people, so useful to mankind in general: this, however, as appears from the case of the Young Jacob and Johanna, is in general a matter of forbearance, and not of right (4). The instances of the encouragement of fisheries by the earlier nations, are ably traced by Macpherson in his Annals of Commerce (5). Scotland appears to have been much attached to fisheries at a very early period: leaving aside conjecture as to the means used by Macbeth to improve the fisheries (6), it appears very clear that from 1124 to 1153, the fishery in the Firth of Forth was attended by English, Scottish, and Netherland fishermen; that the English fishermen were so numerous there, in the reign of Edward the first, that on a breach of a then existing truce by some Dutch armed vessels, 1200 of them were killed; and about the eleventh year of the same reign, the sheriffs of Cumberland and Lancaster

(1) Lord Somers' Tracts.
(2) 3 Adolphus, 279.
(3) See Statutes and Law in 1 Chitty on Game Laws, 239 to 267. and 3 Ch. Crim. L. Index. titles Fish, Oyster, Larceny.
(4) 1 Robinson's Rep. 19.
(5) 1 Macph. 94. 124. 207.
(6) 1 Macph. Hist. Com. 284. 325. 426, 7. 436.

were ordered to send people to buy fish on the western coast of Scotland, and to carry them to Chester; and another order was made for provision of 100 barrels of Aberdeen sturgeons, and 5000 salt fish, and also dry fish; which shews that Aberdeen had the art of curing fish long before the time that the art has been generally supposed to have been discovered in Flanders by Van Beuckels, in 1449 (1). So low were the British fisheries once reduced, that Edward the third licensed foreign fishermen, bringing herrings and other fish for the sustenance of the people of this country, to receive money in payment for their fish, and carry it away, without taking it to the exchangers then appointed at the several ports against the exportation of money, provided they gave security against importation of foreign coins, according to stat. 27 Edw. 1. (2). Spanish fishermen (3) were also permitted to come freely and safely to fish in the ports of England and Bretagne, paying the duties and customs. Henry the fourth granted his protection, for a time specified, to all fishermen of France, Flanders, and Bretagne, for their fishing business (4). The advantages to be derived, however, from the fisheries, do not appear to have been formerly duly appreciated; and although in modern times successive attempts have been made to secure them, yet none have as yet succeeded to the extent which our necessities demand, and to which our peculiar situation entitles us. It has been recently observed, that the former difficulties relative to our fisheries appear by the present political state of Europe to be done away; and if we do not take proper measures to promote them at the present opportunity, it is our own fault (5). It has from the first been an enigma, and unfortunately continues difficult of solution, that with all these local advantages, and all the encouragement afforded by parliamentary bounties, the English fisheries have been hitherto so inferior to those of its rival. Sir Josiah Child (6) in the preface to his Discourse on Trade, published in 1695, ascribed it to the low interest of money in Holland, the disproportion of which to that of England he calculated at 3 *per cent.*; and Dr. Smith (7), after saying that the encouragement of the bounty on tonnage provided in the buss fishery, if not necessarily discouraging to

(1) See post.

(2) Macph. Ann. Com. vol. 1. pp. 463. 506.; and see 38 Edw. 3. st. 1. c. 2. Ante, 150.

(3) 1 Macph. 545.

(4) 1 Macph. 616

(5) 3 Adolph. Pol. St. 279.

(6) Sir Josiah Child's Discourse on Commerce, Preface.

(7) Smith's W. of N. vol. 2. 281. small ed.

the boat fishery, as there contended (but which does not appear to be practically the case from the note in the 1817 edition of his work on the Wealth of Nations) (1), at least shews, that such bounty *on tonnage*, though now reduced to 45 tons in the buss by 52 Geo. 3. c. 153. (2) is only an encouragement to the size of the vessel, and not to diligence or success in the fishery; and he adds his fears, that it has been too common for vessels to fit out for the sole purpose of catching, not the fish, but the bounty (3). That this might in some instances be the desired, if not the attained object, is not perhaps rebutted by the note of the learned editor of the Annals of Commerce (4); that the supernumerary hands they are obliged to ship, (viz. six men for every vessel of 20 tons, and one man for every five tons above 20 tons) (5), and the many restrictions and expences to which they are subject by the bounty laws, to say nothing of vexatious litigation and officers' fees, must at all times effectually prevent any adventurer from fitting out vessels for the purpose alluded to. The note in the 1817 edition of Dr. Smith already referred to, at least shews, that this expensive measure of government has not increased the number of seamen or the quantity of herrings, the former of which he considers, as no doubt it was, one of the principal objects of government (6). But it must be allowed, that by the observations and account of the expences incurred in fitting out a herring buss, contained in Mr. Knox's work (7), it would appear that it never could answer the purpose Dr. Smith mentions; and Mr. Knox, after shewing that the encouragements of the bounties, great as they seem, are found inadequate to the heavy expences attending the British fisheries (evinced by the declining state of the buss fishery, which Dr. Smith himself in his eulogium on the boat fishery allows) expresses his surprise at a writer of his high reputation and abilities labouring to annihilate that mode which government, after the experience of ages, discovered best calculated for their support. However, Mr. Phelps affirms (8), that the fishing vessels which receive the bounty on the deep sea fishery, to this day smuggle between the north of Scotland and the Feroe Islands, and employ fishermen to catch fish in

(1) Smith's W. of N. vol. 2. 295.

(2) See post.

(3) Smith's W. of N. ed. 1817. vol. 2. 293.

(4) 3 Macph. Ann. Comm. 436. n.

(5) 23 Geo. 2. c. 24. s. 14.

(6) 3 Macph. Ann. Comm. 436 n.

(7) Knox's British Empire, vol. 1 360—363, &c.

(8) Phelps on the Fisheries, 219 n.

their boats near the Western Islands, which they return and take, merely to get the bounty; a practice which, it is said, has been carried on to an enormous extent.

The several attempts made by parliament and others to improve our fisheries, are as follow:—The first English association for the purpose of fishing which we find countenanced by authority, was of the right honourable William Earl of Pembroke, Sir William Courteen, Sir John Harrison, and Sir Paul Pindar, about 1633 (1), when king Charles the first granted them some slight encouragement; and in 1654, Sir Phineas Andrews (2), proceeding on the undertaking, had an exemption from customs and excise on all salt spent in the fishery trade; and Simon Smith, esq. had the farther indulgence, that all commodities returned for produce of fish were allowed to be imported custom-free. In Charles the second's reign, about 1661, (3) James Duke of York, Edward Earl of Clarendon, and others, were appointed by commission under the great seal to be a council of the Royal Fishery of Great Britain and Ireland, of which the king declared himself protector (4). About 1683, but little progress having been made, the king, after adding several other distinguished persons to the former council, declared them the Company of the Royal Fishery of England, and granted them power to purchase lands to the amount of £1000 per annum, and to use a common seal (5); a bounty of £20 was also given on English-built doggers (6), as from the greater cheapness of Dutch-built vessels, most of the advantages resulting from the building of the ships employed were enjoyed by foreigners (7). Ill fortune pursued the adventurers; for though the fishery proved tolerably successful, yet in the war which ensued between the Spaniards and Dutch and the French, the latter seized the vessels and goods of the Company as Dutch vessels, they being some, or most of them, in spite of the bounty, Dutch-built and manned (8). They then sold their remaining stock

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(1) Lord Somers' Tracts, vol. 12. p. 34. By the 5 Eliz. c. 5. herrings were allowed, if caught on our coasts, to be exported duty-free. 2 Macph. Ann. Com. 138.

(2) 2 Macph. Ann. Com. 453.

(3) 2 Macph. Ann. Com. 503.

(4) In 1659 the Dutch herring and cod fishery was said to employ 8,000 vessels. 2 Macph. Ann. Com. A. D. 1659.

(5) Lord Somers' Tr. vol. 12. p. 35.

(6) Id. 36. xii. 2 Macph. An. Com. 584.

(7) Sir J. Child on Trade.

(8) Lord Somers' Tr. vol. 12. p. 37.

for payment of their debts, and issued proposals for the terms of raising a stock of £150,000 or £300,000, which they declared essential to the well doing of the undertaking; this was to be raised by shares, the amount of which does not appear to have been fixed, but which probably did not exceed £50 each. In 1666, the importation of fish by foreigners was strictly prohibited. Little further attention seems to have been paid to the fisheries till after the Revolution, when we find the 10 & 11 Will. 3. c. 24. and 1 Geo. 1. st. 2. c. 18. (1) enacting provisions against importation of fish taken by foreigners, and establishing the Newfoundland cod fishery; and in 1695 the Royal Fishery Company was again set on foot (2). Shortly after the passing of the South-sea bubble act, 6 Geo. 1. c. 18., viz. in A. D. 1721, we find that it was proposed by charter to incorporate Sir Robert Sinclair and others for the better carrying on the fishing trade in North Britain, and the then attorney general Raymond advised on the legality of the clauses in the patent (3). In the 9 Geo. 2. (4) the penalty of £100 on every person importing fish contrary to the act 1 Geo. 1. was imposed; and by 25 Geo. 3. (5), two justices of peace are authorized, on information of an officer suspecting such fish to be brought into the port of London, to summon the parties, and proceed to hear the complaint, and convict in a summary way on their non-appearance. The foreign fish allowed to be imported are eels, stockfish, anchovies, sturgeon, botargo or caveare, turbots, and lobsters (6). The first statute we find expressly giving a bounty on fisheries is the 5 Geo. 1. (7), which, with the cumulative statute 26 G. 3. (8) renewing the bounties granted for ten years by the several statutes we have mentioned, gives bounties on the exports of pilchards or shads, cod, ling, or hake, whether wet or dried, salmon, white and red herrings, and dried red sprats, being of British fishing and curing. The 23 Geo. 2. (9), passed A. D. 1749, first gave the bounty of 30s. per ton on vessels from 20 to 80 tons, for encouraging the white herring fishery, authorizing his Majesty to incorporate certain persons under the name and style of The Society of the Free British Fishery, for 21

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(1) Reeves, 1st. Edit. 386. 408. 10 & 11 W. 3. c. 14. 1 Geo. 1. st. 2. c. 18.

(2) 2 Macph. Ann. Com. 674.

(3) 2 Chalmers, Col. Op. 229.

(4) 9 Geo. 2. c. 33. s. 1.

(5) 25 Geo. 3. c. 65. s. 43, 44, &c. Reeves, 1 ed. 405, 6.

(6) Reeves, 1 ed. 408.

(7) 5 Geo. 1. c. 18. s. 6. 26 Geo. 3. c. 81. s. 16. 23 Geo. 2. c. 24.

(8) 26 Geo. 3. c. 81. s. 16.

(9) 23 Geo. 2. c. 24. 2 Smith, 283. Reeves, 1 ed. 289.

years. The 26 Geo. 2. (1) added some regulations. The 30 Geo. 2. c. 30, passed A. D. 1757, increased the tonnage bounty to 50s.; these bounties were payable in England out of the general revenue, in Scotland out of a particular fund, which in 1766 was found to have been anticipated for other purposes, and thus ruined the adventurers on the faith of the bounties, who had increased the number of busses between 1762 and 1768 from 17 to 261, the aggregate tonnage of which was 12,476 tons, manned by 2,881 men. (2) The 11 Geo. 3. c. 31. again reduced the tonnage bounty to 30s. for all decked vessels from 20 to 80 tons burthen, built in Britain after 21 January 1760, and manned, &c. according to the 23 Geo. 2. and other laws then existing. The 19 Geo. 3. c. 26. explained some doubts which had arisen upon construction of the prior acts. The 25 Geo. 3. c. 65. extended the bounty to vessels of 80 tons, took away the necessity of a rendezvous, and only restricted the time; and the purchase of herrings from British boats was allowed. The 27 Geo. 3. c. 10. called the Consolidation Act(3), after giving a tonnage and various other bounties on the British fisheries on the coast, enacts, that fresh British-caught fish may be imported duty-free into Great Britain.

The British society "for extending the fisheries, and improving the sea-coast of this kingdom," was incorporated by (4) 26 Geo. 3. c. 106., and further regulated by subsequent acts; and the 48 Geo. 3. gave a bounty of £3 per ton on every ship of 60 tons fitted out for the deep sea fishery, and instituted a board of commissioners at the same time to superintend and manage its affairs (5). This bounty has been extended by 52 Geo. 3. to vessels of 45 tons burden, manned as there directed. (6)

Summary of Navigation Regulations respecting Fish.

The following is a summary of the rules regulating the public fisheries, as far as respects the navigation laws (7). No

(1) 26 Geo. 2. c. 32. 30 Geo. 2. c. 30. A. D. 1757. 11 Geo. 3. c. 31. A. D. 1771. 27 Geo. 3. c. 10. A. D. 1787.

(2) 1 Knox, 197—199, &c.

(3) Reeves, 1 ed. 407—409.

(4) 26 Geo. 3. c. 106. 39 Geo. 3. c. 100. 42 Geo. 3. c. 79. 48 Geo. 3. c. 110. 50 Geo. 3. c. 11. 54. 80. 108. 51 Geo. 3. c. 34. 101. 52 Geo. 3. c. 103. repealed by 53 Geo. 3. c. 111. s. 1. 52 Geo. 3. c. 153. 54 Geo. 3. c. 102. 191. 55 Geo. 3. c. 94. 57 Geo. 3. c. 34. 124. 58 Geo. 3. c. 38.

(5) 2 Smith's W. of N. ed. 1817. note c.

(6) Ante, 269.

(7) Reeves, 2d ed. 505—507.

British ship or vessel shall be permitted to sail from any of the ports of this kingdom, or of the islands of Guernsey, Jersey, Alderney, Sark, or Man, to be employed in the fishery on the said coasts, unless wholly and solely manned with and navigated by a master and mariners all British subjects (1). Fish of every kind or sort whatever of British taking and curing, caught by the crew of any British-built ship or vessel, owned by British subjects, and navigated according to law, may be imported in such ships free of duty (2). No sort of fish whatever of foreign fishing, except eels, stock-fish, anchovies, sturgeon, botargo or caveare, turbots, lobsters, and oysters, may be imported into Great Britain (3). Oysters are not specially excepted in any statute, but there is a duty on them in the Consolidation Act (4), which, not being leviable on British caught fish, must be construed as a permission to import foreign caught oysters. Perpetual bounties are payable on the export of pilchards or shads, cod fish, ling, or hake, whether wet or dried, salmon, white herrings, red herrings, and dried red sprats, being of British fishing or curing (5). Temporary bounties are payable on the tonnage of ships carrying on the British and the Greenland fisheries, on the quantity of fish taken in the British and the Newfoundland fisheries, on the quantity of oil, head matter, blubber, and whale fins taken in the Southern whale fishery, and on the export of pilchards. Seal skins, head matter, blubber, and whale fins taken in the Newfoundland, Greenland, and Southern whale fisheries may be imported free of duty, provided British-built ships are employed, owned by British subjects usually residing in the King's European dominions, and navigated by a master and three-fourths at least of the mariners usually residing in the King's European dominions. These temporary bounties all depend on the statutes referred to in the note (6), and such statutes as were made afterwards for amending or continuing them.

We have thus taken a general view of the principal statutes affecting the fisheries; these will be more particularly considered

Enquiries into Expediency of existing Regulations and others to be adopted.

(1) 34 Geo. 3. c. 68. s. 4. 42 Geo. 3. c. 61. Reeves, 2d ed. 460.

(2) 43 Geo. 3. c. 68. sect. 6. Reeves, 2d ed. 393.

(3) Reeves, 2d ed. 217. 219. 222. 388. 10 & 11 W. 3. c. 24. 1 Geo. 1. st. 2. c. 18. 9 Geo. 2. c. 33. 26 Geo. 3. c. 81. s. 43, 4.

(4) 26 Geo. 3. c. 81. s. 43, 4.

(5) 5 Geo. 1. c. 18. s. 6. 26 Geo. 3. c. 81. s. 16. Reeves, 2d ed. 506. 55 Geo. 3. c. 94. s. 6.

(6) 26 Geo. 3. c. 81. c. 26. c. 41. and c. 50. since repealed and re-enacted in 35 Geo. 3. c. 92. Reeves, 2d ed. 507.

when we come to treat of the several branches of the trade to which each separate provision of these and other acts applies. The reason given by Lord Somers (1) for the failure of the fisheries in his time would scarcely now be deemed sufficient; the non-observance of Lent, to which the decay in the trade was then attributed, would not now be allowed as an adequate reason; and with regard to his praise of the Dutch busses (2), the encouragement afforded to our own buss fishing has hitherto answered very little purpose, and it seems that the *cobbles, crayers, and boats* formerly undervalued, have greatly exceeded in produce the busses, though launched with superior capital, and backed by parliamentary aid (3). Experience has shewn that societies for the purpose of encouraging the fisheries, as hitherto formed by persons generally unacquainted and unconnected with them, have by no means afforded that effectual support which had been expected, and that they have never answered and never can answer any great purpose; and it has been observed, that any great complicated or difficult plan never will succeed, and that it must be something simple, which will facilitate and encourage the labour of the poor individual fisherman (4). In 1750 a joint stock company was erected, with a capital of £500,000, (5) the members of which were entitled to receive, besides the tonnage duty we have before mentioned, the exportation bounty of two shillings and eight-pence the barrel, the delivery of both British and foreign salt duty-free, and were during the space of fourteen years, for every £100 which they subscribed to the stock of the society, entitled to £3 a year, to be paid by the receiver general of the customs in equal half-yearly payments. Besides this great company, the residence of whose governor and directors was to be in London, it was declared lawful to erect different fishing chambers in all the different outports of the kingdom, provided a sum of not less than £10,000 was subscribed into the capital of each, to be managed at its own risk, and for its own profit and loss; the same annuity and the same encouragements of all kinds were given to the trade of these inferior chambers as to that of the company. The subscription of the great company was soon filled up, and several different fishing chambers were erected in the different out-ports of the kingdom. In spite of all these encouragements, almost all these

(1) Lord Somers' Tracts, vol. 12. p. 49.

(2) Lord Somers, vol. 12. pp. 48, 49.

(3) Smith's W. of N. p. 295. ed. 1817.

(4) 3 Adolph. 278.

(5) 2 Smith, small ed. 283, 4.

different companies, both great and small, lost either the whole or the greater part of their capitals, and the several fisheries are now principally carried on by private adventurers (1). The fact is, as observed by a learned author (2), that all the companies who have set on foot fisheries on a great scale, and proposed to carry all before them by the weight of their capital, have miscarried. They rendered the necessary apparatus dear by a sudden demand beyond the quantity in the market, they immediately employed more people than could possibly be found duly qualified, and they caught more fish than they could find sale for, either in the country or abroad, in competition with the better cured herrings and established markets of the Dutch. He observes, that all the fisheries that have ever prospered, have gradually arisen from small beginnings, the number of people bred to them, and the increase of the markets keeping pace with the gradual augmentation of the fisheries. When to the above drawbacks on the prosperity of a fishery upon a great scale we add the waste and want of economy in the transactions of great societies, and add to all these the innumerable inconveniences resulting from the salt laws, we need not wonder that all the patriotic efforts of great societies have been prejudicial to themselves and devoid of benefit to the country.

It has been ingeniously suggested in a recent publication (3), that the great floating capitals of merchants will never be invested by them in fishing or curing: to buy, sell, and carry, is their business: when the fish are cured and ready, and the oil and other produce of the fisheries obtained, they will vest their capitals in that; but without capital, fisheries cannot suddenly be extended so as to furnish the trader with an object of speculation, and how to make that great and sudden extension so desirable as it is, is the question; and it may here be observed, that it is to the production of the article, and not to the facilitating the disposal of it, that the first attention is to be paid. In the first place, unless fish can be cured at a reasonable price, the catching them will be to no purpose. The price of salt is what renders that easy or difficult. So if the poor fishermen cannot buy their boats and other expensive tackle, they cannot employ their industry. In furnishing the means to pay for them, some certain mode of

(1) 2 Smith, 283, 4. —227.
(2) 3 Macph. Ann. Com. 277 n. and see Phelps on Fisheries, 223
(3) 3 Adolph. Pol. Stat. 277, 8.

repayment or security must be devised. With immoveable property this matter is simple and easy, but with property that is liable to loss or destruction, there are difficulties to overcome. It is perhaps some what quaintly but truly said by Lord Somers in his tracts (1), after shewing the Dutch method of "*raising the buss.*" What, says he, can they do less than take care to preserve it from all storms and bruises while it lies in the harbour; and therefore they have cut rivers and channels for its quiet repose, which requires not the charge either of cable or anchor, or of any person to look to it when not employed in fishing. It then follows that the Dutch are able to borrow ready money on their busses, and nets and tackling belonging thereto, for any employment on the voyage, or to buy salt or victuals, or for any other necessary occasions; and the buss being registered, the title to her is never questionable. So money may at all times be securely invested in the fishing trade by persons not actually employed therein. The desirable object is to furnish the fishermen with vessels and tackle, which without assistance he cannot obtain (2). A government finds it impracticable to enter into the details necessary to aid individuals where there are risks and hazards to run, and where there is room, not only for mismanagement, but for fraud, both on the part of the individuals to be assisted, and the agents employed to give the assistance. In this case an intermediate person should be employed, who should secure the government from risk, and find in his vigilance in looking after the property a reward for his trouble. All the attempts hitherto made to aid and increase our fisheries have been made on a wrong principle, which from its nature could not succeed. They ought not, however, to discourage us, or lead to the conclusion, that aid cannot effectually and advantageously be given, unless we find that the difficulties arise from the nature of things, and not from the manner in which the attempt has been made. To encourage poor men to work, they must be furnished with the necessary implements; and though boats and nets are not very expensive, yet they are far too much so for the fishermen who use them to purchase.

The consideration of the encouragement to be afforded to fishermen, naturally leads us to the question respecting bounties and parliamentary aids to fisheries. Dr. Adam Smith, who in

(1) Vol. 12. pp. 62, 3. (2) 3 Adolph. 278.

general advocates the principle that governments should interfere as little as possible in trade and commerce, allows that fisheries are an exception, that their encouragement is a national benefit, and therefore their extension ought to be an object for bounties and encouragement, at the expense of the public (1). Deep sea fisheries require a larger capital than an individual fisherman can command. But we have seen that societies have never hitherto succeeded, in spite of the immense capital embarked. Would it not then appear that much depends on the fisherman's personal exertion, not cramped with all the rules and orders of a society, or acting as a mere hired servant to any body of men. If it be admitted that the success of the undertaking of a fishery depends more on the individuals actively and personally employed in it than almost any other undertaking, it will follow that the *tonnage* bounty, so lavishly bestowed by some acts (2), falls short of the intended object, and throws the profit, if any, into the hands of the capitalist in his counting-house at home, instead of the adventurer in his fishing bark at sea.

It has been contended that the boat and coast fisheries are objects more deserving of encouragement than the deep sea fisheries, and that the local advantages of the arms of the sea which run up so far into the land in the Hebrides, called sea-locks, and into which the herrings principally resort—in spite of the discouragement to the boat fishery, which a bounty of £3 a ton on buss fishing must create, and which Dr. Smith *then* supposed sufficient completely to destroy the trade of the latter—have triumphed over every obstacle (3)—and that in 1809 three vessels were fitted out under the tonnage bounty of £3 per ton. given by 48 Geo. 3d., in 1810 and 1811, seven vessels; in 1812, ten. There were caught by the vessels thus fitted out in those several years 709½, 978½, 1,588, and 2,839½ barrels of herrings. The *bounties* paid amounted to £5,866, so that every barrel procured cost in tonnage bounty alone 19*s.* 4*d.*, which was nearly as much as the then market price. For the coast fishery there were fitted out during these same years 505, 532, 594, and 923 vessels, which caught and cured 89,476, 90,849, 109,931½ and 150,646¾ barrels of herrings. The superiority evidently evinced by the boat fishery against all adverse circumstances, combined with the great loss incurred by those who were tempted by the

(1) 3 Adolph. 277, 8.
(2) 48 Geo. 3. c. 110.
(3) 2 Smith, pp. 294, 5. ed. 1817.

bounty to engage in the deep sea fishery for 1812, must, it has been observed, at last convince the British Government that their cherished favourite can never realize the expectations formed. The imitation of the Dutch systems without examining the principles of their practice, appears to have led to these results. The deep sea or buss fishery cannot be supposed to be so much the object of the Hollanders choice as the consequence of his necessity. Holland lies at a great distance from the seas to which herrings are known principally to resort, and can therefore carry on that fishery only in decked vessels (1), which can carry water and provisions sufficient for a voyage to a distant sea. The peculiar advantage of the land-locked situation of the favourite resorts for herrings on the West of Scotland, affords every encouragement to the less expensive mode of boat fishing so well adapted to them. The herrings would then be cured on the spot, whither they would daily return, and thus increase the wealth of the remote countries of the Highlands.

But it must evidently appear, that to pursue the herrings in every sea, according to the Dutch method, and at the same time to create the sailors we wish for, it is necessary that larger boats, which can bear the sea, should be used. The Downs society, in their report in August 1816, state that, from the open boats being not calculated to withstand the boisterous weather in the herring season, many of the boats scarcely cleared their expences, without leaving their crews any surplus for the subsistence of their families; while the outfits of French and Dutch craft, amounting to several hundred sail, calculated to stand the weather, as well as remain at sea many days, and proceed to a considerable distance from their own ports, made in 1815 successful voyages continuing the fishery even to our own coasts, and under shelter of our harbours, for several weeks after the boats in the neighbourhood were laid up (2). If the Dutch could always have found as much fish on our coasts as they required, they would never have gone to Iceland for it (3). The quality is superior and the quantity is also greater in the deep sea fisheries than on our coasts. The Dutch (4) had in 1803, 1133 vessels fishing at the same time off the coast of Iceland; and the capital employed, at the average of £800 a vessel, for outfit,

(1) 2 Smith, p. 294. ed. 1817. vol. 12. p. 56.

(2) 3 Macph. Ann. Com. 634. Phelps on the Fisheries, 11, 12. 25. 87. Lord Somers Tracts,

(3) Phelps on the Fisheries, 17.

(4) Phelps, 8.

salt, barrels, and provisions, was £906,400. One third the tonnage of vessels, and one third the capital and expences, would bring as much fish to the Orkneys, salted in bulk, as were by this means brought by the Dutch to their markets. Thus, independently of the paramount consideration of making good sailors for the reinforcement of the navy, it appear that the deep sea fishery can alone ensure *constant* success, the want of which has so much paralized our exertions.

Mr. Knox observes (1), that if ever the great national object of extending the fisheries is accomplished either wholly or in part, it will be solely owing to the encouragement given, not to companies, but individual adventurers, and the abilities of those adventurers to persevere in that business against all the accidents, discouragements, and misfortunes that attend it, both in the taking and the sale of the fish. Even the frugal Dutch, who have reduced all the branches of the fisheries into a regular system founded on long experience, judged it necessary, after repeated attempts in favour of societies, to relinquish that mode, and to direct their attention indiscriminately to the fisheries in general. This is also the practice of all other states whose subjects embark therein. They are encouraged by exclusive privileges and exemptions suited to the various cases and circumstances of their respective situations. If then it is as an independent party that the fisherman most ably prosecutes his perilous undertaking, it follows that the assistance which we have endeavoured to shew it is politic in a government to afford to its fisheries, should be individually bestowed. The objection that government cannot enter into the minute details of fishing risks and such precarious security, again occurs; but this objection has been answered (2). It is observed, that an intermediate person should be employed, who should secure the government from risk, and find in his vigilance in looking after the property a reward for his trouble. A bounty offered to a poor man to produce an article he has not the means of producing, is useless. Instead then of giving bounties for fish caught on the coast, it is suggested that boats should be constructed and let out under the direction of the minister and elders of the parishes in Scotland, or those who manage the poor in England, and that the sum they are to pay should be just sufficient for interest, wear and tear, &c. Being insured against the risk of the sea, the vessel

(1) Vol. 1. p. 170. (2) 3 Adolph. 278, 9.

can never remain unaccounted for, and the sum paid will be sufficient to replace it when worn out by regular use. There are not two hundred parishes in Scotland that touch the coast, and probably £200 in each on the average might be sufficient, and put in activity 20,000 people in this beneficial enterprise; and this sum might properly be applied under the responsibility of each parish, the officers of whom, or those who have the direction, should be bound to see to its proper application.

The return of peace and consequent diminution of employment for seamen have already produced some increase in the fisheries of Scotland. There are now 3,000 large boats and 15,000 fishermen employed in catching herrings on the coast of Caithness, to the great relief and benefit of that country; but they complain of impediments, particularly of the duty on salt, and on staves, on which account they cannot come in competition with the Dutch. By proper regulations and facilities in these and other respects, these fisheries may be greatly extended and will produce incalculable advantages to the community; and it must be presumed that the judicious extension of the bounties to vessels of 45 tons has greatly conduced to this effect (1). Though by a recent statement made in the House of Commons it appeared that only 20,000 seamen were employed in the British fisheries (2), the Dutch employed 9,000 vessels and 360,000 people, which must have given employment to more than double that number of other descriptions of persons ashore. This is stated in a printed report, and it is also said that in the 1818 season, they sent out 1,000 vessels to fish in the north. It is not only the number of fishermen to be employed that is to be taken into consideration upon this subject, but the occupation which will be given to women and children to cure and pack the fish on shore, and the incalculable numbers of persons of various descriptions to whom it will afford other employment, food, and comfort. (3)

Fisheries how far affected by the Salt Duties.

The repeal of the duties on salt, without restriction, allowance, or drawbacks, would afford an effectual mode of substantially serving the fisheries. This tax was first imposed by 5 W. &. M. c. 7. as a temporary measure, to the amount of 1½ d. per gallon; by 9 & 10 W. 3. c. 44. it was raised to 3½ d. per gallon, and in

(1) Phelps on the Importance of extending the British Fisheries.

(2) Phelps on the British Fisheries, 9, 10.

(3) Phelps, 15.

the reign of Queen Anne to 3 s. 4 d. a bushel; it was made perpetual by 26 G. 2. c. 3. (1) and carried to the sinking fund. The 38 G. 3. c. 89. (2) which repealed the whole of the then existing imposts (3), places the new enacted duties under the management of the commissioners of excise, and enacts a great variety of restrictions, under which, in the complicated proceeding of giving bonds and observing other forms, extending sometimes to the obtaining an order from the commissioners of the treasury (4), salt is allowed free of duty for curing fish in the proportions therein specified, subject to certain restrictions, forfeitures, bonds, and penalties, to prevent frauds in digging, boiling, importing, or exporting salt, and in using it for curing fish, or in any manufacture, or for manure, or in any manner inconsistent with its strict provisions (5). To proceed in the order of time in our inquiry into the nature of the salt laws as affecting fisheries, we find that the learned compiler of the Annals of Commerce, in April 1800, laid before the Committee of the House of Commons, a plan to ensure all the benefits, almost beyond calculation, of an extension of the fisheries, and the committee in their report recommended the plan to the attention of parliament, but the war precluded that inquiry. (6)

We will here briefly consider the passages in the report of the committee of 1801, which Mr. Calcraft, in his motion on the subject on Friday the 25th of April 1817, adduced as documentary evidence of the policy of the unconditional repeal of all salt duties; the motion itself and the arguments adduced against and in support of it we shall presently notice, when we take a view of the salt duties in general. The substance of the passages adverted to (7) was that the inquiries of the committee had convinced them of the impossibility of reconciling the collection of this impost with the advantages to be derived from

(1) 1 Evans Parl. Rep. 735.

(2) 38 Geo. 3. c. 89. 4 Macph. Ann. Com. 450.

(3) Under the 5 Geo. 1. c. 10. 25 Geo. 3. c. 65. 19 Geo. 3. c. 26. and 11 Geo. 3. c. 31.

(4) Sect. 93.

(5) So salt made foul by curing fish repeatedly might, by a warrant from the treasury to the commissioners of excise, be permitted to be sold for the sole purpose of *manuring the ground*, but only in places where such foul salt had been heretofore usually sold; thus completely excluding any use of it in any other part of the country than those near the sea-coasts. Only 50lbs. weight of salt for the cure of 100lbs. of cod is allowed duty-free by this act. 4 Macph. Ann. Com. 450. Phelps, 173.

(6) 4 Macph. Ann. Com. 435 n.

(7) 1 Evans Parl. Rep. 734.

the free use of and trade in the commodity; that the fisheries labour under restraints without a corresponding benefit to the revenue, the exemptions in their favour being clogged with conditions that induced the persons engaged in them to prefer the payment of the duties to the acceptance of the exemption; that the depot established for the purpose of remedying this evil had entirely failed; and that the most beneficial consequences would probably result to the commerce and expenditure of the country if a repeal of these duties could be accomplished.

The statute-book during the present reign, from the 41 Geo. 3. c. 21. (1) to the 57 Geo. 3. c. 179, is filled with acts containing various regulations with regard to the obtaining of salt duty free by the fisheries (2). The 57 Geo. 3. (3), after, in a small degree, lessening the strictness and minutiæ of the 38 Geo. 3., repeals the duties on the importation of foreign salt, (4) except a third excise on that imported for the sole purpose of curing fish, and with other restrictions therein mentioned. But the material section of the act appears to be the thirty-third (5), which enacts that any crushed rock-salt delivered from any salt mine on the low duty of one penny for every bushel for exportation, and which, on arriving at the port of exportation, shall be entered for exportation to Newfoundland, the Gulph of St. Lawrence, or the Isle of Man, for the use of the fisheries, and upon oath taken of its being to be exported to those places alone, a certificate for discharging the bond given for the removal of such crushed rock-salt to such port shall be given, and for its shipment, and the proprietor of the salt mine is discharged from paying the said duty of one penny per bushel for such salt, on pain of forfeiture of such salt if not exported as aforesaid, or used otherwise than as afore-

(1) 41 Geo. 3. c. 21. 57 Geo. 3. c. 179.

(2) 1 Evans Parl. Deb. 735.

(3) 57 Geo. 3. c. 49. 38 Geo. 3. c. 89.

(4) Sect. 21.

(5) 33d sect. Mr. Phelps, in his Treatise on the Fisheries, p. 38, conceives that the rock salt of Cheshire is as good in every respect for the purpose of curing fish as the bay or foreign salt, and if found otherwise it can only arise from the crystals being broken by crushing the rock salt, of which that which falls to powder will sooner dissolve, and when employed in curing is weaker than the large salt; and in page 39, as affording proof of the efficacy of rock salt for curing fish and meat, he says, I have known hundreds of tons crushed and sold as bay salt for that purpose, without any complaint; and had it been known to be rock salt, it would certainly not have been used. This salt had been made foul by dirt, to give it the colour and appearance of bay salt.

said, and with a penalty of £100. And by the 36th section (1) any coloured or dyed salt, or crushed salt, or crushed rock salt, may be delivered to and removed, carried, &c. to any fish-curer, under such bonds and regulations as are prescribed by former acts now in force, and by this act specially prescribed; such specified salt having been first approved in writing by the proper inspector, and no such salt being to be delivered to any fish-curer without making entry to use it only for fish-curing, who shall have any white salt, duty free, in his custody for that purpose. By section 45 (2) it is enacted, that it may be lawful for any ashes steeped in liquid brine, and called salted ashes, to be sold for the purpose of manuring land, without payment of duty, on pain of incurring a penalty of £500, should any fraud be committed in selling any rock salt, &c. for that purpose, or any thing else than liquid brine so employed as aforesaid; and, to enable farmers to try the effect of salt in feeding sheep and cattle, it is enacted by this section (3), that coarse rock salt for feeding cattle may be delivered from the pit, &c. in manner herein mentioned, on a duty of 5s. per bushel, on the terms contained in the section, which consist principally of bonds to be given for the use of the salt for feeding sheep and cattle, and in no other manner, &c.

Such are the principal new provisions of this statute, which is the last and most important since the 38 Geo. 3. c. 89. Its principal enactments appear calculated to meet the views of those interested in the price of salt, (who indeed are the community at large, when we consider the extent of its enactments to so many articles of provisions, manufactures, &c.) and to meet the necessities of modern improvements, which gave rise to some of the objections to the system, which did not favour the use of salt as a manure, &c. But, as the operation of its principal object, that of delivering the rock salt duty free, did not commence till April 1819 (4), the effects of the act remain to be ascertained. The preservation to the country of a revenue of £1,500,000 a year must be a matter of serious importance at the present period, which presents few points of choice of a commutation; and it was confidently stated by Mr. Lushington on the second reading of the salt duties excise bill, on the 29th of April 1817, (5) that the opportunity was intended to be

(1) Sect. 36.
(2) Sect. 45.
(3) Sect. 46.
(4) Sect. 93.
(5) 1 Evans Parl. Deb. 767.

given to the fish curer for his benefit, and to use rock salt if he was inclined; that the bill was founded on the evidence of persons interested in the salt trade and the fisheries, and on trials which had led to a sanguine belief that rock salt was perfectly applicable to the purposes of curing and preserving fish; and that it had been productive of the greatest benefits in the Isle of Man. It was on the other hand, in the debate of the 25th April 1817, on Mr. Calcraft's motion to repeal the salt duties, asserted by Mr. Tremayne, on the authority of the persons concerned in the fisheries in the West of England, that the bill to which we have alluded would be extremely detrimental to their interests; and that rock salt would be of no service to them. While the Chancellor of the Exchequer read an extract from a paper signed by the proprietors of several extensive salt works in the county of Chester, who were of opinion that Mr. Calcraft's motion would ultimately be injurious to their interests. Mr. Curwen asserted a curious fact, that the Dutch, 200 years ago made above two millions of the fisheries, whilst we did not now make above a million and a half, and the Dutch ten millions.

It seems to have been the opinion of some of the ablest examiners of the subject, that a due encouragement of the fisheries cannot be obtained by the circuitous (1) operations of salt duties, exemptions, bonds, drawbacks, &c. nor by any half measures, but by the total abolition to be persevered in of all duties on salt, whether home made or imported, and the imposition of a commutation tax equivalent to the net proceeds of the present salt duties. The great increase in the received amount of the reduced duties upon tea and coffee proves how much more productive moderate duties are than high ones. How much more cogent is the argument when the national fishery, the national prosperity, and the naval force of the empire, are the objects to be promoted or neglected? But there is another object infinitely superior to these, and to all the above-mentioned advantages, if the virtue and happiness of the people are to be considered as objects of the highest importance, which is, that the subject will be exempted from all the hardships and oppressions, pains, penalties, perjuries, evasions, and other innumerable evils, which are and ever must be the inseparable attendants of the salt laws (2). It has been suggested, that the

(1) 4 Macph. Ann. Com. 435.

(2) They are peculiarly liable to the objection urged to the policy pursued in France, of imposing stamp duties on contracts themselves, instead of the instruments

taking off the duty on salt is essential to the encouragement to the fisheries, and that the mode of effecting that object without material prejudice to the revenue, would be by allowing those who wanted salt to cure fish to have the quantity necessary duty-free on giving a bond on unstampt paper to cure the quantity of fish, return the salt, or pay the duty (1). This would be preferable to a drawback, which does not prevent the *necessity of an advance of money*, though it afterwards repays it. In fishing and curing fish, the business is to enable people who live on the coast to do it with advantage and with little capital, for men who have capital seek easier employments. The utility of fisheries for procuring food, and as a nursery for seamen, has been often mentioned; but let us consider the necessity of keeping in the country part of those immense sums that go to Russia annually for tallow, (410,260 tons of which are yearly imported into this country), and for which perhaps two millions are paid, and we shall see a further reason for this encouragement. We cannot produce more tallow than we do at present without increasing the breed of cattle, and we cannot diminish the consumption of tallow to a considerable extent but by increasing the quantity of oil produced from fish, and reducing its price.

In our disquisitions on the different fisheries, which have been the subject of so much philosophical investigation, as well as legislative enactment, and commercial enterprize, none can claim a more attentive examination than the British and Northern *Herring and Cod Fisheries.* Whether we consider the employment and comfortable support of an increasing population, or the often urged topic of the peace establishment of a powerful navy, the subject appears, in all its bearings, pregnant with the most important consequences to Great Britain. In the present breathing time of Europe, the statesman will have leisure to mature those political regulations which the more pressing events of the late war had excluded from his consideration (3).

2dly, Of the British Herring and Cod Fisheries (2).

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in which they are contained, viz. that such an arrangement involved the subject in a thousand nice disquisitions and disputes concerning the nature of his contract, and whether taxable or not, with the fiscal agents, in which it cannot be supposed but that the latter must ever have the advantage, and particularly in cases where an appeal to so distant a tribunal as the treasury is the court of error for the questions arising in a remote fishing town in the north. Esprit de Loix, b. 13. c. 9. 1 Bla. Com. 324.

(1) 3 Adolp. 280.

(2) See division of the subject, ante, 267.

(3) 3 Macph. Ann. Com. 470. notes.

With regard to our exclusive right to the possession of the herring fisheries on our coasts, we have already partially considered the subject when examining the right to freedom of passage by land and sea (1). Though it is laid down in the ancient writers that the right of fishing in the sea is common to all men, as well by the primeval law of nature, as by that of nations, Loccenius observes, that this right does not follow the simple rule of nature except in a sea hitherto subjected to no dominion, or in places where it has not been otherwise provided by law or custom; because, from the moment in which princes assert their dominion over the seas adjacent to their territories, they by that act impose a restraint on the common right of fishing inherent in all men (2). Hence it arises that fisheries in the sea or in public rivers in process of time, from the assertion of this dominion, have been enumerated among those royal prerogatives and rights of the Crown, the enjoyment and profits of which are in the hands of its subjects, so that the discussion is no longer to be directed to the original right of the acquisition, but to its preservation as it now stands. Thus superior lords conferred a right of fishing with the fief, and such right was publicly farmed out for returns made to the royal treasury (3). It is observed in Selden's Mare Clausum, that the reason why licences for fishing in English seas are not often met with was, that in the leagues made with foreign princes, the liberty of fishing and passage was so often allowed for both parties while the league was in force, the sea served as a common field as well for the alien friend as for the king of England, the paramount lord and owner (4). Thus a right of fishing for herrings in the British seas was granted to the Hollanders by the treaty of peace and mutual commerce, made at London, A. D. 1459, between Henry the 7th, King of England, and Philip Archduke of Austria; and England also had once that indulgence from the kings of Sweden and Norway on their respective coasts (5). The position of Grotius (6) that the right of fishing ought every where to be open to all the world, as no dominion can be imposed on the sea which cannot be ruled, could only hold in the rude state of society under the primeval law of

(1) Ante, 98, &c.

(2) Loccenius de Jure marit. lib. 1. 95, 6, &c.

(3) Id. lib. 1. 99. et per tot.

(4) Seld., Mar. Claus. lib. 2. c. 21. p. 358.

(5) Boxhornius' Apology for Navigation of Holland, cap. 14. Loccenius, lib. 1. 100.

(6) Grotius Mare Liberum, book 5. p 53.

nature, when we were not bound by positive laws and treaties, expressly recognising the assertion of exclusive rights over the seas adjacent to any territory, by its inhabitants or sovereigns. And on that very principle, Grotius himself in another work afterwards controvert his own position (1). The point then to be ascertained is, how far these exclusive rights to fisheries on coasts have been defined and determined. In the leagues and treaties made for admitting foreigners to a share of fisheries, we find the grant restrained to certain limits, both of time and place; thus reserving to the paramount power all beyond them in both cases (2). Thus, in the reign of Henry the 4th, a treaty was made between the kings of England and France, that the subjects of either might freely fish in that part of the seas adjacent to the coasts of each of them, bounded by Scarborough and Southampton on one side, and the coast of Flanders and the mouth of the Seine on the other side, between autumn and the kalends of January following (3). So during the war between Spain and Holland, James the 1st of England marked out along his coasts certain boundaries within which he would not allow any of the belligerent powers to pursue their enemies, or to wait and observe the ships of either party that should enter or sail out of his ports (4). And Vattel adds, that the parts of the sea thus subject to a nation are comprehended in her territory, nor may any one navigate them without her consent (5). It seems needless further to refer to instances of the treaties and solemn acts in which the dominion of the seas with regard to fishing has been recognized. They are amply dilated upon in Mr. Selden's work (6), in which the effect of the licences for fishing obtained by the Dutch and others on payment of stipulated sums, by treaties, letters patent, and otherwise, is fully shewn; and our right to maintain what was no doubt originally obtained by our great naval force is established. If it is liable to infringement by superior power, the right of resumption would remain on a favourable opportunity; and Vattel puts the case of the republic of Venice and her sovereignty in the Adriatic and other seas, which is now vanished, as a proof of its being ridiculous to assert the pretensions of Great Britain in the interim of such a suspension of her rights. (7)

(1) Grotius de Jur. Bell. et Pac. cap. 2. s. 6.
(2) Selden Mare Claus. 358. lib. 2. cap. 21.
(3) Ibid. lib. 2. c. 21. p. 358.
(4) Vattel, 127, &c.
(5) Vattel, id. ibid.
(6) Selden, lib. 2. cap. 28. passim.
(7) Vattel, b. 1. c. 23. s. 289.

We now come to the history of the herring fisheries from the earliest periods in which they are known to have been undertaken. About the year 978 (1) the herring fishery was very plentiful on the coast of Norway, but it is not certain whether the Norwegians only used the herrings at home, or salted and exported them, though the latter seems probable; one circumstance well deserving attention is, that abundance of herrings and corn is marked as the characteristic of a beneficent reign, which proves that the wisest of their kings were careful to encourage the fisheries and agriculture. Marianus in his Chronicles (2) A. D. 1050 supposes, that in the reign of Macbeth, the fisheries were much encouraged in Scotland, and that a balance of cash, arising from the sale of fish, was paid by the neighbouring nations. In 1086 rents were paid in herrings by Sandwich and Dunwich. About 1165 (3) we have the first express notice of a fishery for herrings within the Baltic, at the island of Rugen; and so considerable, that when the stormy winds of November drove them out of the ocean into the narrow channels of the Baltic, great numbers of vessels from various foreign countries used to repair thither to load with herrings. About this time the Dutch date the commencement of their herring fishery, at least on their coasts. In 1201 (4) the town of Newcastle-upon-Tyne made up a list of articles paying duty there to Henry 1st, amongst which was the herring. In 1205 (5), we find the Danes enriched by the profits of their Schonen fishery. About 1273 (6) it seems that the Flemings had been in the habit of fishing on the English and Scotch coasts, which had given umbrage, and that during a month's truce 1200 English fishermen were killed by some Flemish armed vessels. In 1295 (7) the king directed his warden of the coast of Yarmouth to permit the people of Holland, Zealand, and Frizeland, to fish freely on the coast near Yarmouth. In 1316 (8) debts due from Holland to some English merchants were agreed to be paid at the rate of 20s. annually from every vessel bringing herrings or other fish to the London market. In 1357 (9) was enacted the statute of herrings, against the monopoly of them by

(1) 1 Macph. Ann. Comm. 274. Snorro, Hist. Olasi Trygv. c. 16. Hist. Olasi Sancti, c. 22.
(2) 1 Macph. Ann. Comm. 284.
(3) 1 Macph. Ann. Comm. 338.
(4) 1 Macph. Ann. Comm. 366.
(5) 1 Macph. Ann. Comm. 274. 372, 3.
(6) 1 Macph. Ann. Comm. 426.
(7) 1 Macph. Ann. Comm. 455. Fœdera, v. 2. p. 688.
(8) 1 Macph. Ann. Comm. 483.
(9) Stat. 2, 31 Edw. 3.

the people of Yarmouth buying them up. In 1379 the improvident Richard 2d imposed a tax of sixpence per ton on fishing vessels for every week they were employed on the herring fishery (1). In 1382 (2) landlords of inns, &c. were ordered to desist from the noxious practice of forestalling herring or other fish on pretence of any custom or charter, all such being thereby abrogated, and were on no account to hinder fishermen, native or foreign, from selling their wares as they might think proper. In 1386, it appears from Froissart (3) that the king of France prepared to invade England with a great army, encamped at Sluys and along the adjacent coast. Though the Flemings saw their country devoured by these myriads of consumers, so important did they esteem the herring-fishery, that the safe arrival of all their fishermen was thought a consolation for all the hardships they had suffered. In 1391 (4) the king of Denmark granted the people of Amsterdam, who had for some years traded to Schonen for herrings, a piece of land there for their trade. In 1394 (5) we find the first traces of any attention paid to the fishery of foreigners then tolerated on our coasts. For it seems the king understanding that, from failure of herrings elsewhere, many foreigners with vessels, salt, and other requisites for curing herrings, had come on the coast of Yorkshire, where they bought up great quantities of herrings, which they cured themselves and carried away, to the great injury of the town of Whitby, whose chief trade was that of curing herrings; the magistrates of that town proclaimed by his orders that no strangers should thenceforth be suffered to carry away any herrings. Mons. J. P. Catteau Calleville (6) in his Table of Commerce of the Baltic sea, states "that the first establishment of the Hanseatic league for taking herrings, were made on the coast of Scania, in Sweden: that about the year 1400 the Dutch interfered in this fishing; soon after which, in the year 1449, Van Beuckels is said (7) to have discovered the art of salting herrings, for which his country erected a statue to his memory." During the reign of Henry the 4th, (8) about 1402, the Magistrates of Bruges complained to that Prince's council of several injuries, and particularly that a fisherman of Ostend as well as one of Briel in Holland, had been taken by the

(1) 1 Macph. Ann. Comm. 589.
(2) 1 Macph. Ann. Comm. 594.
(3) Froissart, lib. 3. c. 35. Walsingham, p. 325. 1 Macph. Ann. Comm. 599.
(4) 1 Macph. Ann. Comm. 604.
(5) 1 Macph. Ann. Comm. 607.
(6) Phelps on the Fishery, 22, 3.
(7) Ante, 268.
(8) 1 Macph. Ann. Comm. 612.

English when fishing in the North Sea, though they lowered their sails the moment the English called to them. In a truce with France about this time, it was agreed amongst other things, that during the approaching herring season, the fishermen of both kingdoms might fish freely and together from Graveling and Thanet down to the mouth of the Seine and Southampton, and should be kindly received at each others ports; but these harmonious measures were very soon broken. In 1416 (1), the Hollanders began to use the vessels called busses in their herring fishery. In 1423 (2), James I., King of Scotland, imposed a duty of 4*s.* a last on all Scottish-caught herrings, of 6*s.* on all foreign caught, and 4*d.* a thousand on red-herrings Scotch cured. In 1521, we find (3) Henry the 8th, officiating as mediator between Germany and France, and in obtaining free fishery for herrings for both nations in the proper season, even should the war have continued between Charles and Francis. The (4) Dutch herring fishery was so considerable in 1547, that their great pensionary De Witt, in his Interest of Holland, part 2. c. 1. relates that the states of Holland though then but low, and although it was in time of peace, fitted out eight ships of war for the defence of the fishery. In Mary's reign and the year 1557, according to Bishop Lesley, (5) the herrings began to frequent Loch Broom, which has been ever since the principal resort of their innumerable millions on the coast of Scotland. It is said, that in the reign of Queen Elizabeth, 400 Dutch boats were constantly employed in obtaining fish to be sold to the English (6). In 1560, we find (7) Guicciardini, in mentioning the fisheries, say, that the number of fishermen and vessels, especially of Friseland and Groningen then part thereof, Holland, Zealand and Flanders, and of the French with some few English, fishing first on the coast of Scotland, and next on that of England, was almost infinite; but confining himself only to the Netherlands, concerning which he had made a very strict inquiry, he says, that in peaceable times they employed 700 busses and boats, which made each three voyages in the season, each vessel on an average, being computed to takes eventy lasts of herrings in the season, each last containing 12 barrels, from 900 to 1000 herrings the barrel; and as a last

(1) 1 Macph. Ann. Comm. 631.
(2) 1 Macph. Ann. Comm. 638, 9.
(3) 2 Macph. Ann. Comm. 58.
(4) 1 Macph. Ann. Comm. 100.
(5) Hist. Scot. p. 24. 2 Macph. Ann. Comm. 122.
(6) Phelps on the Fisheries, 188.
(7) 2 Macph. Ann. Comm. 133.

commonly yielded £10 Flemish or about £6 sterling, the total amount of one year's herring fishery in the four provinces mentioned, is £490,000 Flemish, or £294,000 Sterling. It is true that it was advanced by Sir Walter Raleigh, in his "Observations concerning the trade and commerce of England with the Dutch and other foreign nations," that the sum of money then obtained for the herrings, sold by the Dutch and caught on our coasts, was £1,759,000 annually; but this appears exaggerated, though the chief pensionary De Witt quoted his authority sixty years after, as believing him to have had good information (1). In 5 Eliz. (2) it was provided, that English-caught sea-fish might be exported free of customs, and that no herrings not well salted should be bought of any strangers. The 13 Eliz. c. 11. (3) continued and remodelled this act in several respects, settling the assize of herring barrels, and prohibiting fish caught by foreigners from being dried in England (4). But though it was attempted in 23 Eliz. (5) to prohibit the importation of foreign-caught salt-fish by Englishmen, and thus to encourage our own fisheries, it was found necessary to be repealed in the 39 Eliz. (6). The 27 Eliz. (7) permitted fish to be carried from one foreign port to another; and the 5 Eliz. c. 5. was continued by 39 Eliz. c. 10. (8) and allowed fish to be exported in ships with cross sails. The ordinary customs to be paid by aliens for the import of salted fish and herrings, were increased in proportion to those paid by English subjects abroad on salt herrings, &c. by the 39 Eliz (9). The same act imposed a penalty of forfeiture of the fish, where any unwholesome or unseasonable fish were sold (10). Ordinances of any corporation, as of the Fishmongers of London, &c. to restrain the taking or selling of fish, are declared void (11), and the 43 Eliz. (12) repealed this section, with the exception of salted fish or herrings which remain unaffected by any such ordinances: and such salt fish or herrings may be sold by any coastmen or fishermen (13). The setting up a new wear and the destroying the spawn or fry of fish, are provided against by 3 Jac. I. (14) which act has been construed (15) not to extend to shell fish, at least only to a taking for destruction, and not as in the

(1) 2 Macph. 235, 6.
(2) 5 Eliz. c. 5. 13 Eliz. c. 11. 12 Car. 2. c. 4.
(3) 13 Eliz. c. 11.
(4) Sect. 6.
(5) 23 Eliz. c. 7.
(6) 39 Eliz. c. 10.
(7) 27 Eliz. c. 10.
(8) 5 Eliz. c. 5. 39 Eliz. c. 10.
(9) 39 Eliz. c. 10. s. 4.
(10) Sect. 5.
(11) 39 Eliz. c. 10. s. 6.
(12) 43 Eliz. c. 9. s. 34.
(13) Id. ibid.
(14) 3 Jac. 1. c. 12.
(15) Bridger, q. t. v. Richardson, 2 Maule and Selw. 568.

case o oysters, where the spawn is removed into beds to bring it to marketable maturity, and the three inch meshes appointed by that act, are allowed to be used for herrings, pilchards, sprats, or lavidnian. In 1615, we find the anonymous author of a pamphlet, written in the cause of the English Turkey Company against the East India Company, complaining (1) that we sent only twenty ships to Naples, Genoa, Leghorn, Marseilles, Malaga, &c. chiefly with herrings.

The memorable æra of ship-money, A.D. 1635, was occasioned by King Charles I.'s real or pretended jealousy of the profits of the Dutch on our coasts. The pretence for this most arbitrary imposition was, that the Dutch (2) assumed a right to a free and undisturbed fishery on his coasts, to which pretension they had been encouraged by the famous treatise, entitled Mare Liberum, published by Grotius in 1612, though Grotius had not so much as once mentioned the Dutch claim to the freedom of fishing on our coasts, being content with asserting the freedom of fishing on the sea in general; yet before king Charles and his ministers would break with the Dutch, and openly vindicate by arms his claim to the sovereignty of the four seas, it was judged necessary to set Selden to write in support of the dominion of the sea, who being a great lawyer, antiquary, and historian, was considered equal to the arduous task of answering so considerable an opponent as Grotius. Mr. Selden had begun his work in the reign of King James, probably on the first appearance of Grotius's Mare liberum, and after many years interruption he afterwards reviewed, altered, and enlarged it, as he himself relates, by command of king Charles, to whom he dedicated it when he published it this year under the title of Mare Clausum. Sir William Beecher, one of the clerks of the Council, by the king's command solemnly delivered a copy of it to the barons of the Exchequer, in open court, who ordered it to be placed among their records, where it still remains (3). It is not possible to give in a small compass the summary of the Mare Clausum; it has been observed (4), that its arguments are drawn from old records and precedents of the titles and claims of the Saxon and Norman kings, in times when there was little or no commerce or naval power existing any where but in the Mediteranean Sea, times

(1) 2 Macph. Ann. Comm. 281.

(2) 2 Macph. Ann. Comm. 384. See excellent observations on this arbitrary and illegal imposition, 6 Hume, 314. Macaulay, Appendix to vol. 2. and 1 Sinclair on Revenue, 262, 3.

(3) Ante, 94. n. 1.

(4) 2 Macph. Ann. Comm. 384, 5.

so very different from that wherein he wrote, when all the maritime nations of the west and north had a maritime commerce and a naval force, and when such claims, strenuously asserted by any one naval potentate, might reasonably and perhaps probably bring on a confederacy of all the other potentates, for reducing that one to moderation. The ship-money duty was repeated annually till 1639, and was valued at £200,000 per annum. By a later commission (1), in this same year, the king excused those towns and counties which, by their situation, could not fit out the ships above specified wherewith they were charged, provided they paid their quotas in money. By a subsequent commission, he directed the officers of his navy to receive the quotas of money, and therewith to rig out, victual, and man from the king's yards and docks a like ship or ships; so that after issuing a proclamation for restraining all but his own subjects from fishing on his coasts without his licence, he sent out a great fleet in the year 1636, which attacked and dispersed the Dutch fishing ships, some of which they sunk, and compelled the rest to retire into the English harbours for shelter, whereupon the Dutch agreed to pay king Charles £30,000 for permission to continue their fishing for that summer, which Rushworth says was actually paid, and the Dutch moreover testified a willingness to pay a future yearly tribute for the like liberty (2). Yet De Witt, in his Interest of Holland, speaking of the bad curing of the herrings caught by the English fishing company, whereby they were rejected at Dantzic in the year 1637 and 1638, and which brought the company to nothing, acrimoniously subjoins, " Whereupon the English changed their former claim upon the whole fishery, for that of demanding the tenth herring, which the diligent and frugal Dutch reputed no less than to fish for and pay tribute to a slothful and prodigal people, for a mere passage along the coasts of England." In 1654 (3) we find the first *formal* establishment of the right of lowering the flag: for by treaty of that date, between the two republics of England and Holland, it was stipulated that the Dutch flag and topsail should be lowered on meeting any ship of war of the English commonwealth in the British seas, in such manner as hath been in any time heretofore practised under any former government. In the year 1654, a number of persons of distinction (4) in London seemed earnestly

(1) 2 Macph. Ann. Comm. 387.

(2) Rushworth's Collections, v. 2. p. 322.

(3) 2 Macph. Ann. Comm. 483.

(4) 2 Macph. Ann. Comm. 459.

to set about the herring fishery, and for their encouragement the English commonwealth granted them an exemption from the duties on salt and on naval stores to be used in their fishery. Collections were likewise made at London and other parts, for erecting wharfs, docks, and storehouses, and for purchasing ground for making and tanning their nets: yet this attempt proved unsuccessful.

The famous navigation act 12 Car. 2. (1) provided that salted herrings and other fish might be exported duty free, and imposed (2) double aliens customs as they then stood on all salted herrings, as well as cod, ling, stock fish, &c. imported into Great Britain, not having been caught by vessels of which the British were real proprietors; and British ships exporting a full moiety of their cargo in fish to ports in the Mediterranean were allowed to import merchandize in the same ship for that voyage on the old tonnage and poundage rates and duties as before the act (3); but this was afterwards restrained to British caught fish (4); and the 15 Car. 2. (5) further provides that no fresh hering, cod, haddock, coal fish or gull fish, shall be imported but in English ships, and fixed fresh duties on importation of foreign caught dried or salt fish. In 1661 (6) King Charles by his commission under the great seal now constituted his brother, the Duke of York, the Lord Chancellor Clarendon, and sundry other persons of distinction, to be the council of the Royal Fishery Company of Great Britain and Ireland, and great advantages were expected from so pompous a title, yet all came to nothing; though it must be owned that the king freely granted them all the immunities and even more than were granted by the commonwealth in 1654 (7), with authority to set up a lottery and have a voluntary collection in all parish churches; moreover all houses of entertainment, as taverns, inns, alehouses, &c., were obliged to take one or more barrels of herrings at the stated price of 30 *s.* per barrel, and 2 *s.* 6 *d.* per barrel was to be paid to the stock of this company on all foreign caught fish imported. In 1662 adventurers in the royal fishing trade were protected from bankruptcy (8), and in 1663 (9) the packing of herrings was

(1) 12 Car. 2. c. 18. 2 Macph. Ann. Com. 481. A. D. 1660.
(2) Sect. 5.
(3) 13 & 14 Car. 2. c. 12. s. 36.
(4) 9 Geo. 2. c. 33. s. 3.
(5) 15 Car. 2. c. 7. s. 16, 17.
(6) 2 Macph. Ann. Com. 503. ante. Lord Somers, 12 vol. 34, 5.
(7) Ante, 203.
(8) 13 & 14 Car. 2. c. 24.
(9) 15 & 16 Car. 2. c. 15, 16. A. D. 1663. 2 Macph. Ann. Com. 512.

regulated. The 18 Car. 2. making it lawful to seize any ling, herring, cod, pilchard, fresh or salted, dried or bloated, or salmon, eels, or congers, taken by foreigners, and imported here, was made perpetual by 32 Car. 2. (1) which also (2) made it lawful for stock fish and live eels to be imported by any one. By 5 W & M. (3) and 9 & 10 W. & M. (4) drawbacks on the exportation of herrings, cod fish, pilchards, salmon, &c. &c. were given. The 10 & 11 W. 3. (5) made Billingsgate a free market for fish, and (6) provided that the London fishmongers were not to buy up more than required by their trade or retail them in lots, settled the assize of fish, and again (7) enforced the regulations against the importing fish in foreign bottoms. In 1 Ann. (8) drawbacks allowed by 3 W. & M. and 9 & 10 W. 3. are further regulated, as is the importation of salt fish, cod fish, ling, and hake (9), caught in the North Sea, are put on the same footing in regard to importation as Newfoundland cod fish, &c. were by 2 & 3 Ann. (10); and the 12 Ann. (11) allowed salt duty free for salting fish in the North Sea and Iceland. In 1719 (12) a convention was renewed and enlarged between his Majesty of Great Britain and the free and imperial city and republic of Hamburgh, concerning the trade of herrings, the principal article in which, in our favour, was the putting us on a par in regard to duties to be paid and privileges to be enjoyed with the Dutch. The 1 Geo 1. c. 18. (13) again provided against importation of all foreign caught fresh fish, except turbot and lobsters, to which the 9 Geo. 2. (14) added a penalty of £100. The mode of proceeding when such fresh fish are suspected of having been imported into London under these acts, is pointed out in 27 Geo. 3. c. 10. s. 43. The 1 Geo. 1. (15) also again fixed the assize of saleable sea fish and (16) of nets. The 5 Geo. 1. (17) allowed salt to be cellared duty free for curing fish, and (18) gave allowances on the salt duties for fish exported. The 8 Geo. 1. (19)

(1) 32 Car. 2. c. 24. 18 Car. 2. c. 2. s. 2. Pope, cliv. rule 1. n. a. Importation, Fish.
(2) Sect. 7. & 11 W. 3. s. 13.
(3) 5 W. & M. c. 7. s. 10.
(4) 9 & 10 W. 3. c. 44.
(5) 10 & 11 W. 3. c. 24. and see 9 Ann. c. 26. s. 3 & 5.
(6) Id. ibid. s. 11.
(7) Sect. 12.
(8) 1 Ann. st. 1. c. 21. 2 & 3 Ann, c. 14. s. 13, 14.
(9) 4 Ann. c. 12. s. 12.
(10) 2 & 3 Ann. c. 14. s. 14.
(11) 12 Ann. st. 2. cap. 2.
(12) 3 Macph. Ann. Com. 74.
(13) 1 Geo. 1. c. 18.
(14) 9 Geo. 2. c. 33.
(15) 1 Geo. 1. c. 18. s. 7.
(16) Sect. 4.
(17) 5 Geo. 1. c. 18.
(18) Sect. 6.
(19) 8 Geo. 1. c. 4. s. 9.

settled the times of accounting for salt delivered duty free for curing fish, and (1) made an allowance for salt lost in port. The 3 Geo. 2. (2) appointed a method for paying bounty on fish exported. A fish-market was established in Westminster by 22 Geo. 2. and 29 Geo. 2. (3); and the former (4) imposed a penalty of £50 on every offence of buying up fish by the fishmongers before it is brought to market in order to its sale by retail, as well on buyer as seller, and the whole cargo (5) must be sold within eight days of arrival on coast. In 1750, the king in his speech at the close of the year 1749, having recommended to the consideration of the parliament the improvement of the fishery, the house of commons thereupon appointed (6) a committee to inquire into the state and to consider of the means for improving the fishery of herring, cod, &c.; and a meeting being held in the city of many eminent gentlemen and merchants in the beginning of the year 1750, it was proposed to form a joint stock of £500,000, provided the legislature would grant an encouragement of four per cent. per annum on that capital, when employed in the following manner; viz. 1. Upon the payment of £300,000 thereof into the bank of England the interest thereon should commence, but should no be payable until £100,000 thereof should be actually employed in the fishery. 2. Upon the payment of the remaining £200,000 into the bank, the interest thereon should commence in like manner, but should not be payable until another £100,000 should be further employed in the fishery; and an act (7) passed, the principal provision of which is the bounty of 30*s.* a ton given to all decked vessels from twenty to eighty tons burthen, British built and manned. Pursuant to this statute, his majesty's charter of incorporation was granted, being dated 11th October 1750. By a supplemental (8) act of the British parliament of the 26th Geo. 2. to explain and amend the 23 Geo. 2. it was enacted (9) that oaths thereby imposed repecting nominal days appointed for rendezvous of busses, &c. are to be conformable to the new calendar, and that the bounty of 30*s.* per ton should not be granted unless the vessel returned to

(1) Sect. 11.
(2) 3 Geo. 2. c. 20. s. 9.
(3) 22 Geo. 2. c. 49. 29 Geo. 2. c. 39.
(4) Sect. 9.
(5) 22 Geo. 2. c. 49. s. 12. 29 Geo. 2. c. 39. s. 1.
(6) 3 Macph. Ann. Comm. 275.
(7) 23 Geo. 2. c. 24. 2 Smith, small ed. 281.
(8) 3 Macph. Ann. Comm. 292. 26 Geo. 2. c. 9.
(9) Sect. 2.

port with the number of hands required by that act, unless reason assigned. The 28th Geo. 2. continued the regulations of the 23d of that king (1), and allowed the society to let their busses (2). In this year, the inhabitants of Lowestoff and Southwold in Suffolk were under the necessity of petitioning the house of commons for relief, the Dutch having persevered in fishing so near the shore, and with such effect, as to sweep the fish out of their bays. The Dutch annoyed them with 100 vessels at a time; and, as they stated, did not allow the British fishermen in those parts to follow their occupations either by night or by day. A trade for turbots, very injurious to the revenue, was also said to be carried on with Holland, in which several thousand pounds per annum were paid wholly in specie to the Dutch by our fishermen, to take these fish out of the ocean for them, this being one of the sorts of fish allowed to be imported in any manner. (3)

A penalty of forfeiture of the whole vessel and cargo was imposed by 29 Geo. 2. and 33 Geo. 2. (4) for breaking bulk or selling fish to sell again before arrival in the river Thames, or for not entering their arrival there as in those acts directed, and for not selling their fish within eight days, (except eels, which are specially allowed twenty-eight days,) (5) or for removing fish out of any vessel arrived in the Thames, into any boat except into a Billingsgate or Westminster market-boat, which shall immediately proceed thither from the Nore without loitering (6), and imposes £5 penalty on selling fish in any shop within 100 yards of Westminster fish-market, such fish-market not being to extend to Covent Garden market. An enlarged bounty of 50s. per ton was given by 30 Geo. 2. (7) on every vessel on which the bounty of 30s. was directed to be paid by the 23 and 28 Geo. 2.; and it also allowed the vessels to be employed in any lawful manner in the intervals of the fisheries (8). A penalty (9) of £100 is imposed on all persons attempting to obstruct the fisheries and drying, &c. the fish on any foreland, or landing the same, or the nets, casks, &c. or entering any harbour, &c., by demanding

(1) 3 Macph. Ann. Com. 306. 28 Geo. 2. c. 14.

(2) Sect. 5.

(3) Ante 273, and see Report of the Committee of the Association for the Relief of the Poor. Phelps on Fisheries, 188, 9. post.

(4) 29 Geo. 2. c. 39. 33 Geo. 2. c. 27.

(5) 42 Geo. 3. c. 19.

(6) 33 Geo. 2. c. 27. s. 8, 9.

(7) 30 Geo. 2. c. 30.

(8) Sect. 5. and 28 G. 3. s. 5.

(9) Sect. 7.

any foreland or harbour dues, within Great Britain and the Islands belonging to her crown.

The 33 Geo. 2. (1) enacts several regulations on the sale of fish in London, tending to ensure a regular supply and to give the public the benefit of a plentiful one, by giving penalties against the buying it up to enhance the price, &c., some of which we have before touched upon; and if any fish, not being unmarketable, &c. which has been brought to the Nore, is wilfully destroyed or thrown away from on board the fishing ship, the master or other offender shall be committed to the house of correction for any period not exceeding two months nor less than one, (2) and an account of the quantity brought to the Nore is also to be taken, and entries made (3). The 2 Geo. 3. c. 15. (4) was passed to reduce the exorbitant price of fish, and in addition to the penalty on breaking bulk for sale before arrival in the Nore (5) imposes a penalty of £10 on breaking bulk of any fish carriage, consigned for supply of London or Westminster, before it is brought into the weekly bills of mortality, and established fish-machines for the conveyance of fish by land carriage (6). No person (7) can be employed or can employ persons in buying fish brought for sale, to divide the same afterwards among fishmongers for sale; and any person (8) refusing to sell forfeits £20, with many other enactments intended for the benefit of the purchaser.

In 1761 (9) the Dutch employed 152 vessels in their herring fishery on the coasts of Shetland and Scotland, and 122 on the coast of Iceland. While they were thus working their gold mine (for so they called their herring fishery, which was entirely carried on on our coasts), the Scots had only 17 vessels employed in this important national object, and this year's was the greatest outfit since the bounties were granted. In 1762 (10) the success of the British herring fishery on the coast of Shetland exceeded that of the Dutch, and our yaggers reached the first markets at Hamburgh and Bremen, though the Dutch outnumbered ours as usual. So eager were the Dutch (11) for

(1) 33 Geo. 2. c. 27.
(2) Sect. 4.
(3) Sect. 5.
(4) 2 Geo. 3. c. 15.
(5) Ante, 297. 29 Geo. 2. c. 39. 33 Geo. 2. c. 7. and see 50 Geo. 3. c. 108. post.
(6) Sect. 5.
(7) Sect. 15.
(8) Sect. 16.
(9) 3 Macph. Ann. Com. 347.
(10) 3 Macph. Ann. Com. 357.
(11) 3 Macph. Ann. Com. 372.

a supply of herrings at the beginning of the season, that two barrels were sold at 570 guilders, £52 sterling each, and 12¾ were sold at 460 guilders, about £42 each, being a parcel dispatched from Shetland at the beginning of the fishery. It was well worth their while to send off so small a cargo to be sold for above 600 guineas, but the prices it seems are not every year quite so high. In 1763 (1) the herrings, after having for 50 years deserted the coast of Sweden, had for some years returned to it in such abundance that 42,012 tons of those fish were sent from the coast into the interior parts of the country. And there were exported from Gottenburg 101,143 tons of salted herrings, 48 of smoked, and 322 of fresh, as also 63,016 cannes of oil made from the herrings. The Swedish government wisely encouraged this very profitable fishery for some time after the revival of it; but by the very superior advantage of taking the herrings in prodigious numbers at almost no expence by seine nets close on the shore, the low price of labour and of casks, it was soon capable of supporting itself without any public assistance, and the Swedes were enabled to undersell every other nation engaged in the herring fishery. From the year 1757 (2), when the bounty on the busses fitted out for the herring fishery was raised from 30s. to 50s. a ton, to 1766, the number of men and busses employed in that business had been considerably increased on the west coast of Scotland, where the commercial spirit of Glasgow had inspired an ardour of enterprise unknown to the rest of the country, which carried the fishery in that quarter to some extent, when all the attempts to establish it on the other parts of Scotland had proved abortive; and it was also supported by a great demand in Ireland and the West Indies, as well as for the home consumption, the truest and most effectual encouragement to any undertaking. But the progress of their prosperity was arrested by the unexpected stoppage of the payment of the bounty on the return of the fleet in January, the reason assigned for which was, that the peculiar branch of the Scottish revenue appropriated for that purpose was already anticipated for some years: and though the bounties were paid off in time, they were paid principally into the hands of people who had bought the certificates at a large discount from the impoverished adventurers in the fishery. The loss sustained by Campbeltown

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(1) 3 Macph. Ann. Comm. 384.

(2) 3 Macph. Ann. Comm. 436. 30 Geo. 2. c. 30.

alone in busses, nets, casks, and buildings, was estimated by Mr. Knox (1) at £335,049. And though some of the adventurers, who were able to stand the shock, still persevered in the fishery, in compassion to the multitude of people dependent on them, and as the only way of employing the capital already engaged in it, trusting to the payment of the bounty at some future day, and accordingly, in the following year they fitted out 263 busses, yet no person could long persevere in a fishery so circumstanced, or continue subject to the expences and restrictions of the bounty laws, without receiving the bounty. Some, however, by sending their vessels to clear out at Whitehaven, obtained a regular payment of their bounty, which in the English ports was payable, not from a particular fund, as in Scotland, but from the general revenue of the kingdom. In May 1767 (2) we find that the king of Denmark, having established a company at his town of Altona in Germany for carrying on a herring fishery in the North Sea, on the coast of Shetland and Scotland, the Society of the Free British Fishery (established in the year 1750 by the 23 Geo. 2. c. 24.) were apprehensive that the magistrates of Hamburgh, with whom they had entered into a treaty for the importation of British herrings, would be induced to give a preference to the herrings brought by their near neighbours of Altona. On this occasion the society represented that the ships of war appointed to attend the fishing grounds might easily prevent foreigners from fishing too near the coast, whereby our own fishermen would enjoy the preferable fishing grounds on our own coasts, and also be freed from the intolerable insolence of the Dutch fishermen. They also asserted that their industry and perseverance had now so far surmounted all obstacles, that in foreign markets the British herrings were pronounced to be equal and even superior to those of the Dutch, and they expressed their hope that the British minister at Hamburgh might be able to prevent the Danish herrings from being imported there on easier terms than the British. The trustees for fisheries and manufactures in Scotland, and the convention of the royal burghs of Scotland, were consulted with respect to the probable consequences to the British fishery from the establishment of the Danish company at Altona; and the following facts are (3) selected by the author of the '*Annals of Commerce*' from the reports of

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(1) Knox, British Empire, 200.
(2) 3 Macph. Ann. Comm. 459.
(3) 3 Macph. Ann. Comm. 459.

those boards, and which we shall here insert, to afford a view of the state of the herring fishery at that period. "For years the shoals of herrings were found so close upon the shores of Norway and Sweden, that they were taken at very little expence by small boats with drag-nets, whereby the state of the herring trade in the Baltic and Hamburgh markets was totally reversed. Formerly the Scots used to carry great quantities of herrings to those markets, but the Swedes have some years ago laid a duty of nine shillings a barrel on herrings imported from Britain. The Swedes, in each of the years 1764 and 1765, exported from Gottenburg near 20,000 barrels of herrings to Ireland, whence they were carried to the British colonies, which also receive great quantities from the Dutch and Danes, by the clandestine trade from the islands of St. Eustathius and Santa Cruz. They also observed that the fishery had been much discouraged by the delay of paying the bounty, which was now in arrears for three years, to the amount of £40,000, the debentures for which were selling at a ruinous discount." Among a great multitude of regulations for the imports and exports, manufactures, &c. of the Isle of Man, there are a set of premiums appointed for the encouragement of the herring fishery in that island (1). In (2) October in 1768 the following premiums were given to such boats as should deliver at Billingsgate in one tide not less than three lasts of herrings caught within 48 hours, at the rate of £12 10s. per last, or about a farthing a-piece; viz, the first boat £37 10s., the second £30, and the third £22 10. We have already noticed the consequences of the irregularity or stoppage (3) in paying the bounty on the herring fishery in Scotland which begun in 1766, while it was regularly paid in the ports of England, as the causes of the difference and the reduction of the Scottish trade. For the summer (4) fishing of the year 1771 there were only four busses cleared out, so that the fishery might be said to be annihilated, or rather abandoned to foreigners, who were enriched by vast sums received for herrings caught in the Scottish seas, great quantities of which found their way to our own West India Islands. So far as the regular payment of the bounty could operate to revive this perishing trade, it was

(1) 7 Geo. 3. c. 43. 3 Macph. Ann. Comm. 462. Post, 11 Geo. 3. c. 52. repealed the premiums on the herring fishery.

(2) 3 Macph. Ann. Comm. 482, 3.

(3) 3 Macph. Ann. Comm. 438. Ante. 1 Knox.

(4) 3 Macph. Ann. Comm, 509.

evident that a smaller bounty regularly paid would be preferable to a larger one with a delay of several years. The proprietors of the busses therefore obtained from government leave to bring in an act to this effect (1), that a reduced (2) bounty of 30s. per ton should be granted for seven years for all vessels from 20 to 80 tons burden, built in Britain, and manned and navigated according to the existing laws, which are fitted out for and employed in the herring fishery. Every vessel of 20 tons is to carry six men, and larger vessels to have one man for every five tons above twenty, and to carry an appointed quantity of nets, salt, and other fishing stores, proportioned to the tonnage. Every vessel intended for the summer fishery must be at the station or rendezvous on or before the 22d of June, and must not begin to fish before the 24th; after which they are to continue fishing till the 12th of October, unless they shall have completed their loading sooner. Those intended for the winter fishery must be at the rendezvous on or before the 1st of October, and continue fishing till the 11th of January, unless completely loaded sooner. The stations appointed for the vessels to assemble at, previous to the commencement of the fishery, and for their return from it, were Yarmouth in Norfolk, Leith, Inverness, Brassey Sound, Kirkwall, Oban, Campbeltown, and Whitehaven; and the bounty in Scotland was no longer to be dependent on the produce of a particular fund, but to be punctually paid from the revenue of the whole kingdom as in England. For the better encouragement of the herring fishery on the coast of the Isle of Man, the importation into Great Britain of herrings, certified by the governor of the island and the custom-house officers to be really caught and cured in that island, was allowed after the 24th of June 1772, on payment of 3s. 4d. per barrel of 32 gallons for salt herrings, and 1s. 8d. per thousand for red herrings. In the same act some doubts respecting the bounties in the herring fishery are explained. By 11 Geo. 3. c. 52. the bounties granted by a former act, 7 Geo. 3. c. 45., to the boats employed in the herring fishery on the coast of Man, and on the linen manufacture, being made payable out of duties arising from the herring fishery itself, having been found ineffectual, from a great part of the fishermen not availing themselves of them, were repealed, but the duties were continued and added to the funds then made for the repairs of the harbours of the island. (3)

(1) 11 Geo. 3. c. 31.

(2) 30 Geo. 2. c. 30.

(3) 11 Geo. 3. c. 52. 3 Macph. Ann. Comm. 513.

The result of the retrospect of the Scottish herring fishery, from the commencement of the bounties to the year 1776, contained (2) in Macpherson's Annals of Commerce, shews the slow progress made during several years; its rise to some degree of importance; the rapid decline of it, in consequence of the protracted and irregular payment of the bounty; and the good effect of the regular payment which afterwards took place at a reduced rate of bounty (3). Campbeltown, the chief rendezvous of the fishery, was raised by it from having only four small vessels and 3 or 4,000 inhabitants in the year 1750, to the possession of 62 stout vessels, carrying 750 men, and a population of above 7,000 inhabitants, in the year 1777; but that increase is a small object in point of national utility, when compared with the increase of seamen produced by the bounty, it being calculated that two thirds of the seamen who man the shipping in the Clyde, besides a considerable proportion of those in the vessels belonging to Liverpool, Bristol, and even London, and great numbers in the navy, had been bred in that fishery. But it appears that after that year (1776), the fishery again declined in consequence of the war; for in 1779 (4) the adventurers in the herring fishery on the west coast of Scotland were so much distressed by the increased prices of barrels, salt, naval stores, and seamen's wages, (these articles having advanced since the commencement of the war from 100 to 400 per cent.,) that the business had been rapidly declining since the year 1776. But these were not the only obstructions to the success of that important nursery of seamen, and source of opulence. The act 11 Geo. 3. c. 31. (5), by which the bounty was reduced to 30s. per ton, obliged the busses to be at the place of rendezvous on or before the 22d of June for the summer fishing, and on or before the 1st of October for the winter fishing; and, as if the restrictions of the act had not been sufficiently oppressive, the officers of the revenue at Edinburgh declared, by a very astonishing construction of the act, that if they sailed before the 22d of June or 1st of October, they should forfeit all title to the bounty, for that the words on *or* before must be understood on *and not* before. This misconstruction, if not perversion, of law, is positively asserted in the printed Memorial of the Adventurers of the British White Herring Fishery, whence it is extracted by

(2) 3 Macph. Ann. Comm. 595.

(3) Ante, 301, 2.

(4) 3 Macph. Ann. Comm. 633, 4.

(5) Ante 302.

that zealous friend of the fisheries, Mr. Knox, in his View of the British Empire (1). The owners of the busses, after having in vain remonstrated with the commissioners upon the obvious meaning of the words, applied for redress to parliament, who, as the former act for the bounty was now expired, continued the same bounty of 30s. per ton for seven years more, by the 19 Geo. 3. (2) to be computed from the 22d of October 1778, and left it to the fishers to be at the rendezvous at any time between the 1st of August and 1st of October. To the former places of rendezvous were added Stornoway in the isle of Lewis, and Stranrawer, in the southwest corner of Scotland. An act was passed in 1780, for laying several additional duties on goods carried from Britain to the Isle of Man, allowed vessels not under 70 tons, carrying herrings from it to Madeira and the Mediterranean, to import wines of any country, except France, direct to Man, with several other regulations for its trade and fishery (3). The official account of the declining state of the Scottish fishery during the war, from 1776 to 1782, as made up in the custom-house at Edinburgh, by Mr. Boyd, examiner of salt and fishery accounts, is printed in Macpherson's Annals of Commerce (4), from which it appears that the fishery is extremely precarious in its nature, and the exportation from the same port very unequal. Campbeltown, which in the year 1755 exported 24,436 barrels, and has been generally one of the chief ports of Scotland for the exportation of herrings, exported this year only 396 barrels. Stranrawer, in the year 1758, exported 13,121 barrels, and has in some years exported none at all. The view of the trade of England in herrings and cod during the same years, is extracted from the accounts laid before the house of commons, and inserted in Macpherson's Annals of Commerce (5). The bounties (6) for encouraging the fisheries are to be paid for all British or Irish vessels, though not the entire property of persons residing where they are fitted out. The herring fishery on the Yarmouth coast had also declined very much (7) in 1782. At this time it employed only 94 vessels, whereas in the year 1760 it employed 205, of from 30 to 100 tons, and gave employment to about 6,000 men, women, boys, and girls, besides 30 or 40 vessels from Folkstone, Hastings,

(1) Knox's View of the British Empire.

(2) 19 Geo. 3. c. 26.

(3) 20 Geo. 3. c. 42. 3 Ann. Comm. 659.

(4) 3 Macph. Ann. Comm. 721, 2.

(5) 3 Macph. Ann. Comm. 723.

(6) 18 Geo. 3. c. 55. s. 8.

(7) 3 Macph. Ann. Com. 723.

&c. which have now deserted it entirely. For about twenty years preceding 1760, the annual capture of herrings on the Norfolk coast was above 47,000 barrels, of which about 38,000 were exported. The fishery which the people of Yarmouth, with the assistance of the Shetland fishermen, used to carry on in about two hundred vessels of from 40 to 60 tons, in the neighbourhood of Iceland, where the cod most saleable in the Spanish and Italian markets are caught, had been annihilated by the operation of the salt laws. Several gentlemen from Yarmouth informed the committee of the house of commons, that they would willingly revive that fishery, if it should be relieved from the oppression of those laws.

In consequence of the liberal encouragement given to the fisheries by the parliament of Ireland, the herring fishery of that country was now considerably advanced (1). The Irish, however, still continued to import herrings to answer the great demand for the West Indies; and the view of the increase of their export and decrease of their import trade, since the commencement of the public encouragement, is given in the third volume of the Annals of Commerce (2). A great proportion of the herrings imported from Scotland is consumed in the country, being preferred on account of their superior curing, the rest are repacked in Irish barrels of 28 gallons, for exportation (3). The Irish have great advantages in the herring fishery. The arrival of the herrings, so precarious upon the extensive west coast of Scotland, is certain on the north-west coast of Ireland, and they swim close to the shore. The fishery is free from restrictions; and the adventurers either fish themselves, or purchase from the fishers, as they find most convenient, whereby they are often enabled to complete their loading in two or three days, and make several trips during one fishing season, which generally lasts six weeks or two months; and thus can they obtain a much greater quantity of fish in the same space of time, and also run their cargoes much earlier to a market, than the British fisherman, who is tied down by law to lose a great deal of time, and support a very heavy expense that he may be entitled to the bounty. The certainty and great abundance of herrings have induced many of the fishermen of England and Scotland to

(1) 3 Macph. Ann. Comm. 724.
(2) 3 Macph. Ann. Com. 721.
(3) 3 Macph. Ann. Comm. 725.

prefer the Irish fishing grounds to those of their own coasts; though there is an unneighbourly jealousy on the subject between the Irish and Scots, greatly against the true interests of both. Upon the whole, the Irish fishery may be considered now as but in its infancy; but if nature and the legislature shall continue to favour it, as they have hitherto done, it must undoubtedly in a few years surpass the fisheries of Great Britain, unless an entire new system of fishing laws be adopted.

As the fishery trade of Ireland was formerly so much connected with that of Sweden, it may be proper here to give some account of the latter. For above twenty years before A. D. 1782, about 200,000 barrels had been annually cured on the Swedish coast, in the neighbourhood of Gottenburgh; the exports from thence to Ireland, which used to be very considerable, were then, as we have just seen, greatly reduced by the improved state of the Irish fishery (1). Several cargoes of Swedish herrings were sent to St. Eustathius in 1779 and 1780, whence they found their way into the various sugar islands. They were not admitted in the French West Indies, and few went to France. The principal markets were within the Baltic sea, as appears by the account of the exports of herrings from Gottenburgh, in the Annals of Commerce (2). So superabundant was the capture of herrings on the Swedish shore, that it exceeded every possible demand for them, and they were obliged to boil many millions of them for oil, one barrel of which was obtained from eighteen barrels of herrings. In 1781, they exported to the Baltic, Holland, and Spain, 14,542 barrels of herring oil, of about 42 gallons each, and from 1,000 to 1,500 were consumed in the country; but this oil is much inferior to whale or even liver oil, and is liable to congeal in cold weather to a consistence something like honey. The herring fishery of Holland (3), once so pre-eminently great and flourishing, in 1782 employed only 200 busses of about 26 tons burthen. The French had for some few years past caught some herrings of an indifferent quality on their own coast, part of which they dried for the Mediterranean trade, but shipped the greatest part for their West India settlements.

In 1784, no herrings appeared on the coast of Sweden, while on the west coasts of Ireland and Scotland their numbers were

(1) Ante, 305. 57 Geo. 3. c. 69.
(2) 3 Macph. Ann. Comm. 726.
(3) 3 Macph. Ann. Comm. 726.
(4) 4 Macph. Ann. Comm. 64.

inconceivably great. On the Irish coast, the fishermen generally loaded their boats with a single haul of a net, and each boat cleared £54 in the three months of the summer fishing, though the herrings were sold during the first month, July, for about 10d. a thousand, or from 4d. to 6d. for as many as a horse could carry, though millions were boiled down for oil, and millions were thrown away. On the coast of Scotland, as many herrings were caught in one inlet of the sea, called Loch Urn in Inverness shire, in seven or eight weeks, as, if they could have been brought to market, would have sold for £56,000(1). After which, the stock of salt and cask being expended, the people, who seem to have known nothing of the method of making oil of them, or were prevented by the want or high price of fuel, gave up the fishery. There are few years in which one or more of the lochs are not equally well stored, but from the mode in which the fishing has been hitherto carried on, it seldom happens that great benefits result from it to the natives. In 1785 (2), passed the 25 Geo. 3. c. 65, to allow busses above 80 tons burthen to receive bounty for 80 tons. The fishing vessels were also relieved from the hardship of making a circuitous passage to a rendezvous, and were permitted to proceed directly to the fishery, any time between the 1st June and 1st October. The salt for curing herrings was allowed to be used in curing cod, ling, hake, &c., though no such fish was entitled to exportation bounty. The busses were also allowed to purchase fresh herrings, cod, ling, or hake, from any boats belonging to British subjects, and also to ship their fish on board other vessels, to obtain the earliest sale, under certain regulations; but if vessels return to port with less than a full cargo, within three months from the time of first shooting their cargo, they are entitled to no bounty. This act relieved the poor highlanders of the western coast from the previous regulations, which prevented them from selling fresh herrings to the busses. They could before only use the fish in the supply of their families, and perhaps that of the very few inhabitants of the banks of the short rivulet running into the head of each salt loch; and their want of salt, casks, and a market, which, in their present circumstances, they could not have, rendered it impracticable for them to cure any for sale. (3)

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(1) 4 Macph. Ann. Comm. 64. This computation was made by Mr. Macdonell of Barrisdale, justiciary bailie of that district.

(2) 25 Geo. 3. c. 65. 4 Macph. Ann. Comm. 74.

(3) 4 Macpherson Ann. Comm. 74. n.

We have already mentioned the new regulations introduced by the 25 Geo. 3. (1) extending the bounty given by 11 Geo. 3. and 19 Geo. 3 to vessels and busses above 80 tons burthen, and the repeal of the injurious regulations with respect to rendezvous, and extending the bounties to vessels under 20 tons, on certain conditions. But the old bounties now expiring, it was enacted by stat. 26 Geo. 3. (2) that from 1st June 1787, for the term of seven years, and from thence to the end of the then next sessions of parliament, a bounty of 20s. per ton should be paid annually to the owner of every decked vessel built in Great Britain, after 1st Jan. 1780, of not less than 15 tons burthen, manned and navigated according to law, which should be fitted and cleared out for and employed in the British white herring fishery (3). The manner in which these vessels are to be equipped and proceed in their voyage, with the mode of making up their cargo, compose a very long detail, not necessary to be here repeated. The act gives likewise several other bounties, namely, 4s. per barrel for herrings packed and completely cured and landed from any buss entitled to the 20s. bounty per ton; or if a greater proportion than two barrels and a half to a ton is so landed, then 1s. per barrel; also a bounty of 1s. per barrel for all such herrings landed from boats not entitled to the 20s. bounty.

In the case of Edgar and others v. Muller and another, in error, in the House of Lords, from the Court of Exchequer in Scotland (4), it was decided, that the bounty of 20s. per ton given by 26 Geo. 3. c. 81. on the buss fishery for herrings, is not payable where the buss lies in port, and sends out her boats to fish. The facts of the case were these: the plaintiffs resided at Staxigo in Caithness, and duly fitted out their vessel according to the act. The vessel was lying at Wink, two miles from Staxigo, both of them being creeks of the port of Thurso, and after the clearing out, but before sailing, the crew proceeded daily in boats to try for herrings, but caught no considerable quantity; they returned each night to the buss in the harbour. She then sailed northward, intending to proceed to the West Highlands, but was driven back to Staxigo, and the herrings then becoming plenty on that coast, she sent out her boats as before,

(1) Ante, 307. 25 Geo. 3. c. 65. 11 Geo 3. c. 31. and 52. 19 Geo. 3. c. 26.

(2) 26 Geo. 3. c. 81. Reeves, Hist. Shipp. 403. Beawes, 6th edition, 104, 5.

(3) Sect. 1, 2.

(4) 3 Anstruther's Reports, 926.

and got a full cargo. It was admitted, that in every other respect she had entitled herself to the bounty, if the mode of fishing by sending out her boats could be so considered. It was proved a common custom in the fishery to run the busses into the creeks while the herrings are plenty on the coast, and the bounty had always been paid for such busses. The fishery must always be carried on immediately by the boats. The Court of Exchequer directed a verdict for the plaintiffs below, and gave judgment for them on the argument of the bill of exceptions. After argument the Lord Chancellor made some observations on the shape in which the case came before the house; and proposed to the house to refer to the opinion of the judges, by whom they were attended, the general question, whether on the facts stated in the record the defendants in error were entitled to claim the bounty of 20s. per ton on their vessel? The judges present, viz. the Lord Chief Baron Macdonald, Buller J. Thompson B., and Lawrence J., having consulted together, Macdonald Chief Baron delivered their unanimous opinion, that the defendants in error had not shewn themselves entitled to the bounty claimed. If we consider the nature of the bounty offered by this act, we must perceive that the legislature, anxious to encourage this fishery in every way, has held out several different premiums to encourage persons to enter into it, and those premiums are proportioned to the expence, labour, and hazard of each adventurer, being the reward of having employed them in an undertaking beneficial to the public. If the expence, labour, and hazard are proportioned to a boat fishery from the shore, the smallest bounty is allowed; if they are proportioned to a fishery by a vessel of 15 tons or upwards, a larger bounty is given; but if proportioned to a vessel standing the hazard of the weather in the deep sea fishery, the bounty is increased accordingly. The candidate for either bounty must shew that he is in the predicament which entitles him to claim it according to the directions of the act, and any practice which may have prevailed contrary to them cannot avail him. The party here claims the bounty of 20s. per ton on his buss, and he must shew that he came within the regulations which entitle him to that bounty. The bounty of 20s. is given for a description of vessels capable of standing out from the shore, and which throughout the whole of the act are evidently considered as being obliged to be at sea during the time they are entitling themselves to it. They are to be *decked* vessels of not less than 15 tons (s. 1.), are to *proceed* on the fishery, and continue *there* until their return to *port* (s. 2.)

They are to proceed from the place where her owner resides on the said intended voyage (s. 3.) The faithful conduct of the master and crew while at sea, and away from the inspection of the officers, is secured by an oath and by security given (s. 4.) On her *return* into port she is to have a certificate, mentioning the *port* from which she *departed*. The intention of the legislature is perfectly clear that the vessel, in order to entitle herself to the bounty, must proceed to the fishery at sea; and the claimant must shew that she has complied with that as well as the other requisites of the act. Here the vessel was regularly fitted out according to the directions of the act, there was also a fair intention to have complied with all the other requisitions of the statute, for the vessel actually commenced her voyage towards the West Highlands and was driven back: before the weather permitted her to resume her voyage, the herrings became plenty on the coast, and the defendants gave up their intended voyage, let the vessel continue in harbour, and carried on a fishery by their boats from the shore till their cargo was completed. They intended to have acted in such a manner as would have entitled them to the larger bounty, but upon the subsequent accidents intervening, this intention was abandoned, and they preferred that sort of fishery which entitles them only to the lower bounty. By so doing they saved the labour and hazard of a fishery at sea, and must content themselves with the bounty applicable to the diminished labour and hazard they actually incurred in a boat fishery from the shore. Thereupon their Lordships ordered the judgment to be reversed.

The 26 Geo. 3. c. 81. was amended and extended by 27 Geo. 3. c. 10. and has been since continued by various acts; (see 50 Geo. 3. c. 54.) It gives also additional encouragement (1) to the deep sea fishery on the north and north-east coasts of this kingdom: namely, for the greatest quantity of herrings caught by the crew of a buss entitled to the above bounties of 20s. per ton, and 4s. and 1s. per barrel, and brought in by such buss between 1st June and 31st November, the premium of 80 guineas; for the next greatest quantity, 60; the next, 40; and the next, 20 guineas. All duties in respect of herrings, cod, ling, hake, and salmon, or other white fish, caught and cured by British subjects, and removed for home consumption, were to cease, except the equalizing duties paid on the importation from Scotland into

(1) Reeves Hist. Shipp. 404, 5. Beawes Lex. Merc. 101, 2, &c.

England of salmon, cod, ling, hake, tusk, and other white fish. The distinction with regard to the bounty made by statute 5 Geo. 1. c. 18. between that called haberdine and other dried cod, was taken away, and instead of the 5s. bounty there is to be paid in all cases that of 3s. per hundred weight. A bounty of 1s. per barrel is given to the inhabitants of the Isle of Man for herrings caught and cured by them, and also on the export thereof the bounties allowed by 5 Geo. 1. c. 18. s. 33, 34 (1); and the duty on the import of herrings from the Isle of Man was from thenceforth to cease. Lastly, in order the better to protect the British fishery, it was endeavoured to give further effect to stat. 1 Geo. 1. c. 18. and 9 Geo. 2. c. 33. for prohibiting the importation of foreign-caught fish; to facilitate the prosecution of offenders against those acts, power is given to two justices, upon the information of an officer suspecting such fish being brought into the port of London, to summon the parties and proceed to hear the complaint, and convict in a summary way on their non-appearance (2). Some alterations were made in this act in the subsequent session of parliament. By stat. 27 Geo. 3. c. 10 the subsequent bounty, which by the former act was confined to busses built before 1st January 1780, is extended to those built after that period (sect. 1, 2). Some trifling alterations were also made as to the cargoes of vessels (sect. 3, 4), and the bounty of 20s. per ton is not to be allowed to more than fifty vessels fitting out in one year from the same port; but when there are more vessels, the fifty having the greatest quantity are entitled to the bounty. Such are the regulations of this long act for promoting and protecting the fisheries on our coasts. (3)

A number of noblemen and gentlemen were incorporated by the style of the British society for extending the fisheries and improving the sea-coasts of this kingdom (4). The purpose of their incorporation is declared to be the erection of free towns and villages, harbours and fishing stations, in the Highlands and Islands of North Britain, for the improvement of fisheries, agriculture, manufactures, and other useful objects of industry in that part of the kingdom, where the dispersed situation of the inhabitants has hitherto impeded their exertions. The company

(1) Ante, 295.

(2) s. 43, 44, &c. Ante, 295, 6.

(3) 4 Macph. Ann. Comm. 123. Reeves, 404, 5.

(4) 4 Macph. Ann. Comm. 110. A. D. 1786. 26 Geo. 3. c. 106.

are invested with the usual privileges and powers of a joint stock company, and persons who may be incapacitated by entails, minority, &c. are empowered to sell lands to them. Their stock is divided into shares of £50 each, and no one is permitted to hold above ten shares. It is transferable by purchase, gift, &c., but the subscribers were restrained from making sales of it before the 10th August 1789. The liberty of importing foreign fish into the Isle of Man was rescinded, except in case of failure in the fishery on its coasts, in which case the magistrates, called the Keys of Man, are authorized to permit the importation of a quantity of herrings not exceeding 10,000 barrels, for the consumption of the island. (1)

In 1787 some of the gentlemen engaged in the fishery at Yarmouth began to fit out vessels for prosecuting the herring fishery, agreeably to 26 Geo. 3. c. 81 (2). Their fishermen proceeded to Shetland, and sometimes so far beyond it as to fall in with floating ice. They followed the Dutch method of shooting their nets, in deep water from the vessels, and not in lochs and bays from their boats, as the British buss fishers do. In the second and third years of their fishing they believed their herrings to be nothing inferior to those of the Dutch in respect to curing, and they sent the most of them to Hamburgh, where, happening to be the first that arrived, they brought a price equal to that of the early Dutch herrings, and after the arrival of the Dutch they were still able to stand the competition with them. This year some of the Yarmouth pickled herrings were sent even to Rotterdam, and the owners had no reason to complain of their sales. But the expence of this mode of fishing, though hitherto attended with such auspicious prospects, being greater than the usual returns could indemnify, and the adventurers being disappointed in obtaining the bounties they thought themselves entitled to, gave it up. Mr. Barker, in his Report on the British fisheries (3), observed, that the deep sea fishing has the following advantages, although the expence of carrying it on is greater than fishing by boats near the shore: first, the earliest herrings are caught in the deep sea; secondly, they are fuller of flesh, in more perfection, and cure better; and thirdly,

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(1) 4 Macph. Ann. Comm. 102.
(2) 4 Macph. Ann. Comm. 191.
(3) 4 Macph. Ann. Comm. 191. n. Barker's Report, A. D. 1798, page 145.

this fishing can be carried on every year, although the herrings do not every season come near the particular shores and bays where they are usually expected. The 34 Geo. 3. (1) enacts, that no vessels shall fish on the coasts six months after the then present war, unless wholly manned by British subjects, with the exception of licence by the commissioners of customs to authorize vessels to have foreign fishermen, not exceeding one fourth of the complement on board, to instruct British seamen in fishing.

In 1795 the 26 Geo. 3. c. 81. for encouragement of the British fisheries, and 27 Geo. 3. c. 10. for extending the provisions of that act, were renewed and continued in force till 1 June 1797 (2). The time for the busses clearing out was extended to the 20th November instead of the first October. A bounty of one shilling, in addition to the former bounty of one shilling per barrel, was allowed on all herrings landed from any boat or vessel not entitled to the tonnage bounty, which are properly salted and cured. Herrings sprinkled with salt at landing may be carried in bulk coastways to the residence of the curers during the fishing season, as may also be the cod, ling, hake, and salmon taken in the herring fishery, on complying with the regulations respecting salt, and the coquet accompanying the fish, expressing that no bounty has been paid on them. The rigorous part of the act of the Scottish parliament in the reign of Queen Anne, which directed magistrates to seize barrels containing any ungutted herrings, and to fine the proprietors, was repealed, and some encouragement was held out to Dutch fishers and curers, &c. to reside here. The encouragements held out (3) by the act 35 Geo. 3. to foreign fishermen, not exceeding 40 in number, to settle with their families, vessels, &c., were continued; the time allowed for their arrival was extended to 31 Dec. 1805; and their vessels, to the number of 20, are admissible, if built before 1st January 1798. The act 26 Geo. 3. c. 81. (4) for the encouragement of the fisheries, was further continued till the end of the next session of parliament: the governor and directors of the British society are by this act (39 Geo. 3. c. 100.)

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(1) 34 Geo. 3. c. 68. s. 4, &c. 4 Macph. Ann. Comm. 299.

(2) 35 Geo. 3. c 56. 4 Macph. Ann Comm. 343.

(3) 4 Macph. Ann. Comm. 444. 38 Geo. 3. c. 57. 35 Geo. 3. c. 92. 42 Geo. 3. c. 114.

(4) 4 Macph. Ann. Comm. 477.

empowered to give premiums, not exceeding £60 in any one year, to sober and industrious persons living in their settlements, distinguished by their expertness in catching and curing fish, making soap or oil from fish, making nets, cultivating the soil, or other useful arts tending to advance the beneficial purposes of the society; also to lend sums of money, not exceeding £500 in the whole, for the purposes of purchasing, building, or equipping boats or vessels for the fishery, or building houses, and to receive the payments with the interest by instalments, in the space of five years. They are empowered also to lend sums, not exceeding £200 in all, to persons undertaking to provide stores of oatmeal, salt, and other necessaries, to be repaid in one year; and a sum not exceeding £200, and for a term not exceeding three years, to the person or persons undertaking to establish a manufactory of nets, sailcloth, or cordage, or spinning hemp, flax, or woollen yarn, to be repaid as the directors shall please to appoint (1). These are very trifling sums to appear in an act of parliament; but a small matter of money may be a powerful spring of activity among poor people in such remote parts of the country, if the application of it is judiciously directed, and if the people were relieved from the hardships and intricacies of the salt laws. The herring fishery (2) on the coast of Sweden, which for a considerable number of years had been remarkably abundant, was so very scanty in 1799, that the exportation of herrings was prohibited till November 1800; and the supply being found insufficient for the home consumption of the Swedes, they even imported some from Scotland. In the year 1793 the herrings were found to be more abundant in the Frith of Forth than they had been known for many years past. In 1794 considerable quantities of salt, barrels, &c. were provided, and houses for making red herrings were erected. In that and the following years the Frith was covered with fishing vessels, not only from the adjacent ports, but from every part of Scotland, the coast of England as far as Bristol, and also Ireland, those from the west coast and from Ireland being conveyed across the country by the Forth and Clyde canal; and the animating appearance of about 360 sailing vessels, and 1,200 boats, all busily engaged in the fishery, together with the great number of gutters, salters, coopers,

(1) 39 Geo. 3. c. 100. 4 Macph. Ann. Comm. 477.

(2) 4 Macph. Ann. Comm. 486, 7.

and other people employed by it upon the shore, revived the remembrance of antient times, when the numerous towns on the coast of Fife were enlivened and enriched by the herring fishery. The revival of this great fishery, which was calculated to produce annually about half a million of barrels of herrings, (for the custom-house accounts exhibit only those *cured* in Scotland, without taking any cognizance of those caught by vessels from England and Ireland, of the vast numbers consumed fresh in the country, or those carried to London, and other parts of Great Britain) afforded a most providential supply of cheap and wholesome food to the adjacent country, and all places to which they could be carried by the higglers, in those years when the price of bread was most exorbitant. Even the London market was supplied by the fast-sailing Berwick smacks with fresh herrings from the Forth, by means of the excellent contrivance of packing fish in ice, and prodigious numbers were also carried in a slightly salted state to London and other places. Though the people of the east side of Scotland were not then so expert in curing their herrings as those of Campbeltown, Rothsay, Greenock, Stornoway, and the west coast in general, great quantities of the herrings cured in the Forth were carried to the West Indies for the use of the plantation negroes, and considerable quantities of the red herrings were also exported. As all these methods of disposing of the fish could not take off the whole of them, the remainder were boiled for oil; and by a new process, herrings and any other fish, even in a putrid state, are made into soap by a mixture of turpentine and other materials. The act of the preceding session (1), for the encouragement of the British fisheries, was continued in force till the 5th of April 1801, and the additional bounty of one shilling, payable on every barrel of herrings landed from any boat not entitled to the tonnage bounty was declared payable to the fishers and curers of fish residing in the Isle of Man. The importation of Swedish herrings, either in British vessels or neutral ones, navigated in any manner whatever, and from any port of Sweden, without payment of duty, was permitted till six weeks after the next session of parliament (2). Thus were there at the same time laws in force for inviting the importation

(1) 39 Geo. 3. c. 100. 4 Macph. Ann. Comm. 500. 39 & 40 Geo. 3. c. 85. s. 2.

(2) 39 & 40 Geo. 3. c. 107. 4 Macph. Ann. Comm. 501.

of foreign cured herrings, and for giving bounties on the exportation of British cured herrings.

The progress of the herring fishery on the coast of Scotland, has been already deduced from the commencement of the bounty system to the beginning of the American war, and afterwards brought down to the termination of it (1). That the herring fishery of Great Britain continued for the most part in a state of progressive augmentation down to 1800, notwithstanding the further reduction of the tonnage bounty to 20s. in the year 1787, appears from the account of the vessels employed in it, and the herrings cured and exported, extracted partly from various accounts laid before the Committee of the House of Commons appointed to inquire into the state of the fisheries, who bestowed much attention to that important object in this and the preceding year, and partly from the books of the inspector-general of imports and exports. And it has been observed, that a great fishing is carried on on the coast of Scotland, by vessels which do not require custom-house dispatches, and of which, consequently, no accounts are kept. (2)

An act was passed in the 41st of the King (3) to enable the treasurer to grant bounties, from the funds therein specified, to persons bringing fish to the markets of London, and to make regulations as to payment, &c.; not to exceed £500 to one vessel, or £30,000 in the whole.

The 48 Geo. 3. (4) (s. 1.) gives an annual advance of £3 per ton, not exceeding £100, to owners or hirers of busses employed in deep sea British white herring fishery; enacts, that nets shall be shot from vessels not at anchor, and without intervention of boats; gives a bounty of 2s. per barrel on white herrings landed and cured; appoints seven of the twenty-one trustees of linen and hemp manufactures in Scotland, to be commissioners of the said fishery, to make a general report of its proceedings annually to said trustees in general, and to Parliament; appoints a naval officer, to be named by the Admiralty, to be superintendant

(1) 4 Macph. Ann. Comm. 531.
(2) 4 Macph. Ann. Comm. 532.
(3) 41 Geo. 3. c. 99. A.D. 1801.
(4) 48 Geo. 3. c. 110. A.D. 1808. 51 Geo. 3. c. 101.

of the fishery for its protection and the enforcing this act, in a ship of sufficient force; administers an oath to him against his having interest in the fishery; appoints officers of the fishery, named by the treasury, understanding the trades of a cooper and herring curer, to account to the commissioners; gives a penalty of £40 against nets of not less than one inch mesh; prescribes (s. 13.) fitting out of busses and their voyage (s. 14.), with many other enactments through sixty-one sections. The 50th of the King (1) continued the 26 Geo. 3. c. 100. to 25 March 1811; and also contains an act passed to enlarge and amend the act of 1762 (2); its principal new provisions are for the protection of seamen and other persons employed in fishing vessels according to tonnage from impressment, under certain restrictions there pointed out.

In the 51 Geo. 3. A. D. 1811, an act passed (3) to extend the bounty given in the 48th of the King to ships of 45 tons, British built, manned, navigated and registered according to law, sect. 1.: and any ship less than 60 tons and not less than 45 tons, must be manned with 10 men, or 8 men and 2 boys above 13 years of age (s. 2). The 54th of the King (4) enables the British society for extending the fisheries and improving the sea coasts of the kingdom, to levy rates, &c. on ships frequenting their harbours. The 55th Geo. 3. (5) gives a new bounty of 4s. per barrel of white herrings caught in British fisheries, landed, &c. as provided by prior acts, and repeals the bounty of 2s. per barrel granted by 48 Geo. 3., and contains many other regulations. The 56th of the King (6) contains a provision very important to the fisheries; as the owners of that description of vessel called a lugger, and which is particularly adapted for smuggling, and therefore liable to forfeiture, are thereby enabled to obtain licences from the commissioners of customs for employing such vessels not exceeding 65 tons within a certain distance from the coasts; but security must be given in treble the value, as by 46 Geo. 3. The 57 Geo. 3. (7) contains an act for conti-

(1) 50 Geo. 3. c. 54. A. D. 1810. 50 Geo. 3. c. 108. A. D. 1810.

(2) 2 Geo. 3. c. 15.

(3) 51 Geo. 3. c. 101. A. D. 1811. and further enforced by 52 Geo. 3. c. 153. A. D. 1812. and see 48 Geo. 3. c. 110.: and all these acts are continued to the end of the next Session of Parliament by 54 Geo. 3. c. 102. A. D. 1814.

(4) 54 Geo. 3. cap. 191. 26 Geo. 3. c. 106.

(5) 55 Geo. 3. c. 94. s. 6. A. D. 1815. 48 Geo. 3. c. 110. s. 3.

(6) 56 Geo. 3. c. 104. sect. 33. A. D. 1816. and see 16 Geo. 3. c. 137. s. 2.

(7) 57 Geo. 3. c. 69. A. D. 1817.

nuing divers acts relating to the Irish fisheries. The British fisheries are also mentioned in the act passed for the loan of a million and a half Exchequer bills to the labouring community then suffering under great want of employment (1). The late salt acts, as affecting our fisheries, have been already considered. (2)

In the season of A. D. 1818 the herring fishery on the north side of the Moray Frith, from Fraserburgh to Fort George, was most successful. The calculation is made by a person of much experience and intimately acquainted with the facts it rests on.

Cured in the Fraserburgh District, - -	17,000 barrels.
——— in the Banff ditto - - - -	31,000 ditto.
——— in the Port Gordon ditto - - -	11,000 ditto.
——— in the Nairn ditto - - - -	22,000 ditto.
Total,	78,000

These are supposed to have averaged to the curers, including the duty, 34s. per barrel, or £132,600; freight obtained for conveying them to the various markets, averaged at 4s. per barrel, is £15,600; total £148,200. On the opposite side of the Frith, the quantity caught is supposed to have been greater, so that this source alone has thrown into circulation not less than £300,000 on both sides of the Frith.

The last report of the commissioners for the herring fishery, of their proceedings during the year ending April 5, 1818, was ordered to be printed on the 17th of February 1819. In a preceding report the commissioners had adverted to the measures adopted for increasing the exportation of British herrings to the continent of Europe, and in the last report they pointed out the great increase that had actually taken place in this branch of the export trade. In the present one they state, that they have received a memorial on the subject from Hamburgh, signed by a number of herring merchants at that port, bearing testimony to the improvement that has taken place in the quality of British herrings, and pointing out the means of raising their character still higher. This memorial the commissioners have very judiciously caused to be printed and distributed among the curers, with such additional observations of their own as they conceive to be necessary.

(1) 57 Geo. 3. c. 34. & 124. (2) Ante, 280 to 285.

By comparing the accounts presented in this report with those of the preceding year (in which the quantity of herrings was greater than in any former period), it appears that a very considerable increase has taken place in the quantity caught, the quantity found entitled to bounty, and in the quantity exported. In the year ending April 5th, 1817, the total quantity caught was 192,343½ barrels; in the year ending April 5th, 1818, the total quantity caught was 227,691 barrels, being an increase of 35,347½ barrels. In the preceding year, the quantity of herrings branded for bounty was 140,018½ barrels; in the latter, 183,089½, being an increase of 43,071 barrels. In the former period the total quantity exported was 138,682½ barrels; in the latter, 162,339½, being an increase of 23,711 barrels. From the above statement it is apparent that the character of the British fisheries is rising both at home and abroad. The commissioners report, in fact, that the demand has fully kept pace with the increased supply, and that at the end of the season few herrings remained unsold in the hands of the curers. They observe, also, that while the exportation to the West Indies and Ireland has increased, a new market has opened in the East Indies, to which different shipments of herrings have been made, by way of experiment, both from Greenock and London. From the former place, upwards of 1,300 firkins were exported to Calcutta, within the year, all of which were purchased, it is understood, by Europeans there, at twenty shillings to twenty-five shillings per firkin. The result of the adventurers from London had not been communicated to the commissioners at the time (Nov. 2, 1818,) of making their report: but they were sanguine in their expectations of equal success, and there was every reason to believe that India would soon become a permanent and valuable market for the consumption of British herrings.

The report concludes with the following enumeration of the advantages already attendant upon the increased stimulus given to the herring fishery on our coasts, and the effects of which are felt in almost every part of the kingdom.

" The fishermen have in many cases been enabled, by the produce of their industry, to replace the small boats formerly used, by new boats of much larger dimensions, and to provide themselves with fishing materials of superior value; the number of boats and of fishermen has been greatly increased; while by

the general introduction of the practice of gutting, a valuable source of employment has been opened to thousands of poor people, who now annually resort to the coast during the continuance of the fishing season, and there earn a decent livelihood in the operations of gutting and packing. New dwelling-houses and buildings, on a superior construction, for the curing and storing of the herrings, are erecting at almost every station along the coast; while the demand for home wood for the manufacture of barrels, affords a source of profit and employment to numbers of people in the most inland parts of the country.

" The spirit of enterprize thus diffused, the improvement in the size of the boats and in the materials of fishing, together with the increase in the number of fishermen, afford good grounds for predicting a still further extension of the fishery; and it shall be the continued study of the commissioners, to enforce the provisions of the statutes to which these benefits are to be ascribed, in such a manner as may most effectually tend to produce a corresponding improvement in the cure, and an increased demand for British herrings." (1)

(1) The following observations have appeared in a modern publication:

" It has been observed by historians, that *their High Mightinesses the Dutch* were originally a colony of poor fishermen, and the large and flourishing cities which we now see were nothing more than a few huts for the accommodation of those industrious men, who, by their skill and united efforts, have excelled all other nations in the art of taking and curing fish. By this trade alone they have been raised from poverty to wealth, from a state of insignificancy to the dignified character of a free and independent nation.

" It is supposed that, since the year 1500, they have taken fish on the coasts of Scotland to the value of nearly three hundred millions sterling, while the natives have done little or nothing, although the fish were almost at their doors.

" The Dutch claim the merit of being the first who established a regular herring fishery, and they have ascribed the invention of pickling and drying herrings to William Benkelen, of Biervlet, near Sluys. They are mistaken in this, as herrings were cured on the continent, and in Britain, many centuries before. It is, however, probable, that Benkelen made great great improvements in this art, which has enabled his countrymen to carry on the herring trade with so much advantage. By their skill and industry, together with proper assistance and instruction from their government, they have brought the herring fishery to the greatest perfection.

" It would be wise for the government of Great Britain to follow their example, and encourage individuals or companies who may be inclined to establish fisheries on the coast of Scotland. To conduct them with the same skill and industry as the Dutch have done theirs, would prove an inexhaustible source of wealth to the nation;

The whale fisheries on the coasts of Scotland and Greenland, and in the South Seas, are the next in consequence. We will

3dly, Of the British Greenland and Southern Whale Fisheries (1).

they would also give employment to thousands of the inhabitants, and enrich many individuals.

"In 1636, when Charles the first prohibited the Dutch from fishing on the coast of Scotland, the States General were so sensible of its value, that they paid to the king £30,000 for the liberty to fish for that season, and offered to pay annually the same sum for the liberty to fish for ever, but it was rejected.

The Dutch have taken great care to conceal the manner in which their fish were cured; they were aware that if this secret was known, they would no longer be able to carry on so extensive and so profitable a trade. From this circumstance, we have but a very imperfect history of their herring fishery.

"The Dutch busses are the best constructed for the herring fishery in the open sea, as they are long round vessels, with a waist about two feet and a half high, which not only makes them warm and comfortable, but safe for the fishermen while employed in gutting and curing the herrings.

"A new buss for the herring fishery on the coast of Shetland, in summer, will cost from £1000 to £1500, including every thing necessary for the fishing. The size of the busses is from 50 to 70 tons; and each buss has 50 nets, which are fixed to a strong rope, called the buss rope. These nets generally extend 50 fathoms in length and eight in depth. This rope, upon which all the nets are strung, is about 120 fathoms long, and nearly eight inches thick, and is made of the very best materials, and never used more than two or three years at farthest. There have been instances of this rope breaking, when all the nets, and every other thing belonging to it, were lost, and the buss obliged to return for that season without having caught a single herring.

"These busses are divided below decks into little rooms, sufficiently large to hold a part of the outfit; and the entrance to each is from the deck. This arrangement is to prevent all hurry, bustle, or mistake, as every one is supposed to be well acquainted with his own department.

"When they sail from the port, the busses are laden with casks, many of which are filled with salt, for the purpose of curing the herrings which they expect to catch. As neither Dutch nor British salt is calculated for curing the fat herrings caught on the Shetland coast, the Dutch have always used foreign salt, either from Spain or Portugal. The casks measure about thirty-four gallons, and are very slight, although neatly made, intended only to carry their herrings to market once. The prime cost of the one in Holland is a guilder.

"The crew of a buss consists of fourteen persons,—the master, the mate, and the cook, five experienced fishermen, two young men who have not full wages, and two younger than these at still lower wages, and two poor boys who work for their victuals only.

"They never begin to fish before the 24th of June, but after that time nets are thrown into the sea, and when hauled in, and the herrings taken from them, they are thrown into a vessel upon deck, where they immediately begin to gut, and prepare the herrings for packing into barrels; and, if any remain uncured at the going down of the sun, they are thrown over-

(1) See the division of the subject, ante, 267.

consider them in the order in which they have gradually risen into importance, and been regulated by the legislature. It

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board. It requires five of the fishermen at least to be coopers, who are employed to cure and pack; and each man is obliged to use a particular mark of his own, which he must put upon all casks he coopers, so that if any of the herrings are damaged from slight workmanship before they get to market, the cooper is known, and part of his wages are kept from him, as a fine for his carelessness. As soon as they have got a number of barrels packed, there are vessels called jaggers, or yagers, attending, ready to receive a cargo of the herrings, and which they carry to different markets in Europe. This practice is not only convenient for the busses, in being relieved from a load which rather encumbers them, but it is of the greatest advantage to the Dutch, as their herrings are earlier than any other in every market in Europe, and which enables them to undersell all others.

" The superior quality of Dutch herrings may be attributed to the following causes:

" 1. They make it a rule never to begin to fish before the 24th of June, the season when the herrings are fattest; from the 24th June to the end of July, is the time when all the best herrings are caught.

" 2. The herrings are taken alive out of the nets, and not suffered to remain long in them after they are caught. British vessels, who fish with boats, suffer the nets to remain a long time on the ground, after the herrings are taken.

" 3. The moment the herrings are laid on deck, they are strewed over with salt, the gills and guts are taken out by an incision made with a knife instead of the fingers, as is the custom with us. The using a knife is the preferable way, as the great blood vessels at the heart are laid open, and a considerable quantity of blood is discharged. By these means, the Dutch herrings are much whiter than the British, being secured from blackness, occasioned by the coagulation of blood.

" 4. The Dutch cure the herrings with refined salt, prepared for the purpose. The salt from Spain or Portugal is not considered fit for use, before it is purified of all putrescent matter, which rather corrupts than preserves the herrings.

" 5. They never take more herrings on board in the morning, than they think they are able to cure about the going down of the sun. If any should remain after that period, the master is obliged to throw them overboard.

" 6. The great care observed in making the barrels of proper wood; oak staves, half an inch thick, are considered the best, and of such they are generally made, and so closely put together, as to hold in the first pickle; which alone cures the herrings.

" 7. The good laws and wise regulations, enforced with regard to the whole process of curing and packing, have also contributed to their success.

" As these laws give us a good deal of information concerning the fisheries. A few of them are selected.

" 1. The master of each buss shall declare to the secretary of the port from whence he sails, where he intends to fish, to what port he intends to return, and what mark he is to use, that it may be registered, under the penalty of 120 guilders.

" 2. That no master of a buss shall be allowed to go to the herring fishery. without the consent of the burgomasters of the town from whence he sails. That he shall

seems probable that from the earliest periods of history, the natives of the northern parts of Europe were accustomed to

make oath that he is properly furnished, according to the size of his buss, with tackle, seamen, barrels, salt, and all other necessaries wanted or used in the herring fishery. That he will not begin to catch herrings before the 24th of June, nor continue later than the 20th of November.

"3. He must make oath that he will separate the herrings taken in one night, from those taken in another night, and that he shall notify, in the list of the marked barrels, on what night each was taken, under the penalty of forfeiture of ship and cargo. He must not fill up the herring barrels more than once with pressed herrings, taking special care that they are laid even in the layers, from the bottom to the top, and not cast in with baskets into the barrel, so as to be mixed, wrong laid, or adulterated, always taking care that none of the bloody pickle be spilt.

"4. He must make oath that he will not sell, give in presents, or cure on shore any herrings, under a penalty of 24 guilders for each barrel, and confiscation of the ship. Nor has he a liberty to traffic for herrings with any ship or yagers, but those authorised by the burgomasters, where the herring trade is established in Holland and West Friesland, and who shall produce the proper voucher of consent, having on the top the representation of a herring buss, being the seal of the great fishery, stamped thereon, and signed by the secretary of the city from whence he comes, to which ships he shall be empowered to deliver over his herrings, taken from the 24th June to 15th of July, and no longer, under the penalty of losing the herrings, and a fine of 600 guilders.

"5. The masters of yagers shall make oath that they will not take on board herrings from any others but subjects of Holland and West Friesland, observing to get a certificate from the master, signed by himself and two or three sailors, with the ship's name and port she sailed from, the quantity delivered, and that they were taken after 24th of June, being salted and laid in his ship, under the penalty of losing the herrings.

"6. The master shall not mix different sorts together, or sort them as the first sort, which contains full, middle, and small. But the first, or full herrings, shall be sorted with the first, the second, or middling herrings, with the second, and the third, or small herrings, with the third; and, if the master has not time to sort them properly at sea, on coming on shore, he shall be obliged to report them to his owners as unsorted herrings.

"7. The first taken herrings are not to be sold, unless they have been ten days in pickle, and not even then till marked by the inspectors, between the neck and belly hoop, under the penalty of 300 guilders

"8. No inhabitant of Holland or West Friesland shall be engaged with others living out of these provinces, in busses or yagers, under the penalty of losing ship and cargo; and a fine of 600 guilders may be recovered, although twenty years after the offence was committed.

"9. Whoever shall cure herrings with French salt, from St. Martin's, Olderdame, Borev, Browant, the West Indies, or Isle of Man, shall forfeit the herrings.

"10. No Spanish or Portuguese salt shall be put into casks, before the cure-master has examined it, under the penalty of 25 guilders for every hundred weight; this must be done before it is shipped,

catch whales when they appeared on the coasts within the reach of such vessels as they had, which were of a size and form little adapted for the pursuit of these animals to their native polar regions. We learn, from the voyage made by Ohther (1), by orders

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by the cure-master, and stamped with his mark, under the penalty of 36 guilders.

" 11. Every twelve barrels of herrings to have four barrels of salt, and the herrings to be well gutted, and properly laid in the barrels, under the penalty of 300 guilders.

" 12. The curing of herrings shall be completed in three weeks after they arrive, whether they are sold or not, and may be packed more than once, according to the nature of the herrings and the custom of the place; and if not in the limited time, the buyers to have no redress.

" 13. No herrings shall be repacked with fresh pickle, but in the public streets or customary places, with open doors, where all may have a liberty to enter, under the penalty of 240 groats.

" 14. No herrings shall be repacked and sent abroad before the cure-master has inspected them, and ascertained that they are properly packed. Each cure-master may make the master of the buss open his barrels twice for inspection, and at each time to pay half a farthing, the one half to be paid by the buyer, and the other by the seller.

" 15. Herrings taken after July the 26th, and cured with fine salt, may be exported as wrack westward: the barrels to be bound with sixteen hoops, having the date of the year on the belly, and the mark of the purchaser.

" 16. Herrings taken after the 24th of August and Bartholomew tide, may be cured with fine salt, boiled with sea water, according to agreement with the city of Cologne.

" 17. There shall not be sent abroad to the westward, or France, Flanders, or Brabant, any herrings but those taken and packed after Bartholomew tide, and marked with the grand Rouen brand. Nor shall any be sent to Hamburgh, Bremen, Cologne, or other ports, that may be cured with coarse salt, whether they be wrack or refusal fish, on penalty of six guilders each barrel, and naval correction.

" 18. Herrings once exported shall not be brought back, or cured anew, under the penalty of losing the herrings.

" From these regulations we may see that the Dutch government considered the herring fishery as a trade of great importance to the state; it was not left to the management of a few individuals, but made a national concern; and to this we may fairly attribute their extraordinary success.

" If our government would give the same assistance and encouragement to the inhabitants of the north and isles of Scotland, they would be equally successful; and surely one million a year, derived from the herring fishery, is worth their consideration and encouragement.

" Although the climate and soil of the north of Scotland, in general, are unfavourable for agricultural purposes, yet nature hath amply compensated for this want, by an abundant supply of fish, sufficient for the consumption of all Europe. I trust, ere long, the matter will be brought before Parliament, and taken into their consideration as a national concern, in a more effectual manner than has hitherto been done, and means devised to prevent the Dutch from carrying away so much wealth from our shores."

(1) 1 Macph. An. Com. 263.

from Alfred, between the years 871 and 900, that at that time the northern people were accustomed to catch whales and seals, of the skins of which they made ropes of all sizes, and also horse-whales, the teeth of which were valuable as well as their skins, which were likewise used for making ropes. Whales of 48 and 50 elns (72 and 75 feet) were then so numerous on the coast of Norway, that it is said Ohther, with the help of five men, could kill 60 of them in two days. In 1553 (1), a company of London merchants was formed for the purposes of discovery: Sebastian Cabot was chosen their governor. Three vessels were fitted out under Sir Hugh Willoughby, and carried letters from Edward VI. addressed to all kings and princes, requesting their friendship. Sir Hugh Willoughby, and the crews of two of his ships, were frozen to death in an obscure harbour in Russian Lapland: but Richard Chancellor, in the third ship, getting into the bay of St. Nicholas, in the White Sea, landed near Archangel, and obtained considerable privileges for the English trade at Archangel from the czar John Basilowitz. Thus, though disappointed in their hopes of arriving at China by the supposed north-east passage, they made an useful discovery of a trade by sea to Russia, and moreover pointed out to the English the way to the whale fishery at Spitzbergen. That he ever discovered that country was afterwards disputed by the Dutch (2). The first notice we have of any attempt on the part of the English to become acquainted with the art of whale fishing, is in Hackluyt's Voyages (3), where we have the request of an honest merchant, in the year 1575, by a letter to a friend of his, to be advised and directed in the course of killing the whale. The answer in substance was, that there should be a ship of 200 tons burthen with proper utensils and instruments. But what is most to be noted is, that all the necessary officers were then to be had from Biscay, which shews that the Biscayners were the earliest whale fishers of any nation of Europe, excepting however the people of Norway, who were employed in that trade at least as early as the time of King Alfred (4). The first mention we find of the whale fishery being actually prosecuted, is in 1593, when it seems from Hakluyt (5) that some English ships made a voyage to Cape Breton, at the entrance of the bay of St. Lawrence, for morse and whale fishing,

(1) 2 Macph. An. Com. 114.
(2) 2 Ann. Com. 114, 15.
(3) Hackluyt, vol. 1. Lond. 1598. p. 413. 2 Macph. An. Com. 157.
(4) Supra, 325, 6.
(5) Hakluyt, London, 1598. 2 Macph. An. Com. 204.

and although they found no whales there, they however found on an island 800 whale fins, where a Biscay ship had been lost three years before, which is also the first mention of whale fins, or whalebone, by the English. By the trade to Archangel the English were now well acquainted with the northern seas, where they carried on a great fishing, or hunting rather, for the morses, beyond the north cape of Cherry Island; and it seems that the English fell afterwards into the whale fishery, from the natural shyness of the morses, which was so much increased by the pursuit they experienced, that the moment they saw any man they ran into the sea. In 1597 (1), the several trials for a north-west passage to China by Hudson's and Davis's Straits, and for a north-east passage on the north side of Nova Zembla, or through the Straits of Waygatz, and the annual voyages to Archangel, had so accustomed the English to those boisterous seas, that some of the Russian company now occasionally commenced for the first time the fishing for whales, near Spitzbergen, where those huge animals were found in greater numbers than in any other place then discovered. The Russia (2) company having sent a ship in the year 1610, to explore the coast of Spitzbergen, now fitted out two ships for the purpose of catching whales, which carried with them six Biscayners, that people being supposed the most expert in such a fishery. Both ships were lost, but the men were saved by a ship belonging to Hull, which was upon the same fishery. From the year 1598, the English went on unrivalled with their whale fishing at Greenland, till 1612, when the Hollanders first resorted thither, whereupon some of the English Russia company's ships outward bound-seized the whale oil, fishing tackle, &c. of the Dutch, and obliged them to return home, threatening, that if ever they found them in those seas thereafter, they would make prize of ships and cargoes, insisting that the king of Great Britain had the sole right to that fishery, in virtue of the first discovery thereof, and of Spitzbergen; and in the following year the English actually brought home two Dutch ships as prizes. In 1614 (3), King James commissioned Sir Henry Wootton, his ambassador extraordinary to the States of the United Provinces, and others, to treat with the commissioners of their High Mightinesses concerning the differences between the subjects of the two nations, on account of the free commerce of his subjects to the East Indies, obstructed

(1) 2 Macph. An. Com. 213.
(2) 2 Macph. An. Com. 265.
(3) 2 Macph. An. Com. 275.

by the Hollanders, and also on account of the fishery in the North Sea, near the shores of Greenland, of right solely belonging to him and his people, but interrupted also by the Hollanders (1). The Russia company, in 1613, sent thirteen ships (2) to Greenland, and the Dutch eighteen ships, four of which were ships of war of the States, where they fished in spite of the English Company's exclusive pretensions. In 1615 (3), the Danes sent three ships of war to Spitzbergen, then called Greenland, and demanded toll of the Russia company's ships found there, which they refused, alleging that Greenland, *i. e.* Spitzbergen, belonged solely to the king of England. We find from Sir Dudley Diggs's defence of the East India trade, in 1615, against the prejudices then existent against it, that the East India company claimed to themselves the discovery of the Russian coasts, and the honour of having first discovered the whale fishery at Greenland, and employing the Biscayners, and defending the fishery at their own charge. This must have been at the time of their attempting the north-west and north-passages to India, about 1593 (4), as we find the Russia company about 17 years afterwards employing their Biscayners to teach them whale fishing (5): but the English afterwards claimed the first discovery, as made by Sir Hugh Willoughby in 1553 (6). In 1617 (7) the quarrels at Spitzbergen, about the whale fishing, ran very high between the English and Dutch, the former seizing on part of their oil; and this is the first time we find mention of fins or whalebone being brought home with the blubber or oil, though probably before this time it came into use for women's stays, &c. by means of the Biscay whalefishers. In the year 1618, king James I. (8) as king of Scotland, incorporated a number of English, Scots, and Zealanders, to be a new company to fish at Spitzbergen, and much shipping, provisions, &c. were contracted for. Yet after all their preparations, this Scottish patent was annulled, and it was agreed that the East India adventurers should still join stock with the Russia company, and be one joint company for the whale fishery. Thirteen ships were sent thereupon; but the Zealanders proving superior there, and being exasperated at the seizure of their oil, &c. in the preceding year, and their disappointment by rescind-

(1) Fœdera, xvi. 774.
(2) 2 Macph. An. Com. 275.
(3) 2 Macph. An. Com. 282.
(4) 2 An. Com. 204.
(5) Ante. 327.
(6) 2 Macph. An. Com. 379.
(7) 2 Macph. An. Com. 287.
(8) 3 Macph. An. Com. 287.

ing the Scottish patent, attacked, overpowered, rifled, and dispersed the English ships, most of which returned home empty.

The method of managing the whale fishery of both nations, was then quite different from what it is in our days. The whales in those early times having never been disturbed, say our voyagers, resorted to the bays near the shore, whereby their blubber was easily landed at Spitzbergen, where they erected coppers, &c. for boiling their oil, which they left standing from year to year, and only brought home the purified oil and whalebone. The English having been the first in that fishery, kept possession of the best bays. The Dutch coming later were obliged to find bays further north. Yet the Danes, who came later into this trade than the Dutch, got in between the English and Dutch. The Hamburghers came after the Danes, and after them came the French, and also the Biscayners, who, though older whale fishers than any in Europe except the Norwegians, had not however fallen into this method but by the example of England and the rest, and who were forced to set up their coppers, &c. further off; but since those times the whales are less frequent in the bays, and are usually found among the openings of the ice further from land, which obliges the ships to follow them thither, so that the blubber is now cut from the whales in small pieces at the ship's side, and brought home in casks to be boiled and purified, and the whale fins also to be cleaned. This later method of fishing being often found dangerous and perilous to shipping, discouraged our English adventurers, who then traded in a company, so that they soon after relinquished that fishery, and so it remained till the reign of King Charles the 2d. A dispute having arisen in (1) 1618, between the English Russia company and the Hull men, about their whale fishery at the isle of Trinity, lying on the North Sea towards Spitzbergen, that company claiming an exclusive right to the fishery, yet the Hull ships having first discovered that isle, and very early fished at it, it was this year granted to the corporation of Hull by King James for their whale fishing. In 1619 (2) the Russia and East India companies of England fitted out nine ships and two pinnaces for the whale fishery at Spitzbergen. But the voyage proving unfortunate, the two companies having carried it on jointly for two years without success, agreed to give up that fishery. Having thus abandoned the pursuit as public com-

(1) 2 Macph. An. Com. 292. (2) 2 Macph. An. Com. 292.

panies, four members of the Russia company, in 1620, sent out seven ships to Spitzbergen on their (1) private account, but proved unsuccessful. In 1621 they met with better success, but no mention is made of any whalebone or fins being brought home. The year 1622 was very bad, but in 1623, the last year of their union, they had good success, though unable to drive the Dutch away, who were superior in number of ships, and had the Prince of Orange's commission. In the year 1634 (2) the Dutch Greenland company left seven of their sailors to winter at Spitzbergen, till now believed to be impossible. One kept a diary from the 11th of September to the 26th February following, when the scurvy and cold so weakened and benumbed them, that they could not help themselves, and were all seven found dead in their house, at the return of the Dutch ships in 1635. As for the claims of different European nations to a monopoly of the fishery of whales at Spitzbergen, they stood thus for some years after this time. The English alleged that they were the first discoverers by Sir Hugh Willoughby in the year 1553 (3). The Dutch denied his having been so far north as Spitzbergen, and alleged their first discovery in 1596. The Danes claimed it as a supposed part of old Greenland, early possessed by them; but if prior discovery gave any just exclusive right to a country uninhabited and uninhabitable, it is most probable that the Biscayners, who were the first whale fishers of later ages, had the best right to it. Since those times all nations have wisely dropped their exclusive pretensions, and that part of the icy world remains now alike free to all nations for this fishery. Sir Josiah Child in his Discourse on Trade (4), laments that in 1664 the Dutch and Hamburghers had annually 4 or 500 sail at the Greenland fishery, and the English but one, and the year before none. In this state it remained till the 25 Car. 2. c. 7. (5) passed for encouraging the Greenland and Eastland trades, in substance reciting that English harpooners could not be got; the act of navigation was so far dispensed with by this act for ten years to come, provided the ship be English-built, and the master and half the crew be English, the other half might be foreigners, in the said fishery. This, it is true, produced some private attempts for reviving that fishery, which however in seven years after fell to nothing again, though neither the oil

(1) 2 Macph. An. Com. 305.
(2) 2 Macph. An. Com. 379.
(3) 2 Macph. An. Com. 114, 115.
(4) Sir J. Child on Trade. 2 Macph. An. Com. 544.
(5) 25 Car. 2. c. 7. 2 Macph. Ann. Com. 563.

nor whalebone were to pay any duty, but it was provided that our plantation shipping should pay 6s for every ton of oil, and £2 10s. for every ton of whale fins imported in their own shipping, and half so much if imported in English shipping. If oil was imported in foreign bottoms, the ton of oil was to pay £9, and the ton of fins £18. In the 1st session of the 2d year of William and Mary, c. 4, anno 1690 (1), this act was continued for four years longer, but not so much as a single ship was fitted out in consequence thereof. In 4 and 5 Wm. & M. c. 17. (2), passed for encouraging, regaining, and settling the Greenland trade, it is recited, that the trade to the Greenland seas in the fishing for whales had heretofore been very beneficial to England, both in respect to the employment of seamen and ships, and the consumption of great quantities of provisions; as also in the importation of great quantities of oil and whale fins; yet that this trade had been wholly lost to the kingdom, and could now no otherwise be revived than by united endeavours in a joint stock, wherefore this act incorporated Sir Wm. Seawen and forty-one persons more, to be a corporation by the name of the Company of Merchants trading to Greenland, with the usual power of succession, &c.; this company having already subscribed £40,000 for that purpose; the master and only one-third of the mariners to be English, and the ships to be English-built. This corporation to exist only for 14 years, from the 1st of October 1693.

The circumstance of 355 British ships having been employed in the whale fishery in 1721 (3), probably, in part, encouraged the new South Sea court of directors to propose a whale fishery to their general courts, which however did not finally agree to it till three years after.

In 1724 (4), after much debate in several of the general courts of the South Sea Company, concerning the utility of attempting a Greenland trade or whale fishery, wherein it was plainly shewn that former Greenland companies were so unsuccessful as to run out their whole capital; and that some foreign nations have sundry advantages over our people in respect to this fishery, the company at length resolved to commence that fishery. It was certainly a well intended and popular resolution, and was agreeable to the powers granted by the first act of parliament, and to

(1) 2 W. & M. Sess. 2. c. 4. A. D. 1690. 2 An. Com. 563.

(2) 4 & 5 W. & M. c. 17. 2 Macph. An. Com. 653. See this act extended by 1 Ann. st. 1. c. 16.

(3) 3 Macph. An. Com. 119, 120.

(4) 3 Macph. An. Com. 130, 1.

the royal charter for erecting the company, as well as to part of the title given to it by the royal charter. In order to encourage the company, the 10 Geo. 1. c. 16. (1) for encouraging the Greenland fishery, repealed the duty of 3d. per pound weight on whale fins, and enacted that whale fins, oil, and blubber of whales, caught and imported in British ships, whereof the commander and at least one-third of the mariners should be British subjects, should absolutely be custom free for 7 years, from 25th Dec. 1724; and by 12 Geo. 1. c. 26 (2), the freedom from all customs whatever was extended to Davis's Straits, and the seas adjacent, and also comprehended therein seal oil, seal skins, or any other produce of seals, or other fish or creatures caught in any of those seas, such as the large white bears commonly found on the ice there, and sea-horses or morses, also very numerous in those seas. Twelve fine ships of 306 tons each were built in the Thames in 1724, and in 1725, the unfortunate whale fishery commenced: the whole fleet brought home 25 whales and an half; which, though scarcely a saving voyage, was nevertheless the very best year of any of the next eight years in which they carried on the fishery. The trade having been entirely relinquished for so many years past, there was not an Englishman to be found who knew any thing of the whale fishery, and the company were obliged to have all their commanders, harpooners, boat steerers, line veerers, and blubber cutters from Fohrde, in Holstein, except some few Scotch who left the Dutch service. Those men cost the company the first year £3,056. 18s. 3d. though but 152 in number, not only because they were all what are usually called officers in that fishery, and consequently had more wages and allowances than the common sailors; but had also their charges borne by the company both in coming every year from, and returning back to Holstein to their families, as was also their constant practice when employed by other nations. Whereas, above double their number, viz. 353 British subjects employed on those 12 ships, cost but £3,131 15s. 5d. On another attempt made in 1725 (3) by the South Sea Company, 12 more ships having been built, 24 sailed, and caught only 16½ whales. In 1726, (4) they sent out 25 ships, of which two were lost, and the remainder brought home but 22½ whales. In 1728 (5) with 23 ships they caught only 18 whales. In 1729 (6), they lost one of

(1) 10 Geo. 1. c. 16. 3 Macph. An. Com. 130.
(2) 12 Geo. 1. c. 26.
(3) 3 Macph. An. Com. 132.
(4) 3 Macph. An. Com. 135.
(5) Id. 141.
(6) Id. 146.

these 23 ships, and the other 22 brought home 27½ whales: and the company's net loss by this single year's trade, besides wear and tear, being £6,904 8s. 4d.; and in 1730 (1), their remaining 22 ships brought home 12 whales, at a loss of £8,921 5s. 9d. besides wear and tear. The whale fishery on the coast of New England was prosperous in 1729 (2), and in 1730 it (3) employed 1300 tons of shipping. The South Sea company in 1731 (4), sent out their remaining 22 ships on the whale fishery, one of which was lost, and the remaining 21 brought home 14 whales, which was far from being a saving voyage. At the company's dock there had, at this time, been invented a new sort of gun for shooting with gunpowder the harpoons into the bodies of whales farther than they could be thrown by hand, and the ships were accordingly provided with some of them, which were used in the fishery with some success. It was chiefly useful in calm though scarcely practicable in blowing weather, which mostly prevails in the Greenland Seas; and in a private ship fitted out about 1733, out of 3 whales brought home, two were killed by it. In 1732 (5), they again ventured to send out their remaining 21 ships on the whale fishery; it was the last attempt they made for recovering to Great Britain that valuable branch of trade, as finding themselves to be very great losers thereby; the ships brought home 24½ whales, which likewise proved a very losing voyage. That company having ventured fully as far, if not farther than in prudence they ought to have done in the whale fishery, in consideration of their having for eight years together been considerable losers, thought it high time to lay it aside entirely. Wherefore they sold off all their ships, stores, and utensils, and upon finally stating the account of this fishery, it appeared

That their total disbursements, on account of their Greenland whale fishery in the eight years, amounted to - - -	£262,172	9	6
And the total amount of the sale of their oil and whale fins, as also of the sale of all their ships, stores, and utensils, was but -	84,390	6	6
So the net loss sustained by this Greenland fishery in principal money alone, (without the interest on the money advanced in each of the eight years) was - -	£177,782	3	0

(1) 3 Macph. An. Com. 155.
(2) Id. 156.
(3) Id. 166.
(4) 3 Macph. An. Com. 167.
(5) Id. 178, 179, 180.

It has been usually computed, that if a Greenland ship brought home but three whales, it would be a reasonably gainful voyage; but most unfortunately for the South Sea company they had not, in all the eight years fishery, brought home at the rate of one entire whale per ship, taking one year with another. It has, moreover, been a maxim among the whale fishing adventurers, that one good fishing year in seven usually makes up the losses of six preceding bad years. But it was very unhappy that all those eight years happened to be bad, not only to the company but to most of the adventurers of other nations. It must, however, be allowed by all, that this company, by sustaining so great a loss in endeavouring to promote so national a benefit, has greatly merited the favour of the public; and moreover, that if this fishery could have been brought to be profitable to the company, it would most certainly have been a gainful one to the nation, as will plainly appear in the following respects, viz. By saving great sums of money sent annually beyond sea for the purchase of oil and whalebone, which we absolutely cannot be without. By building and employing so great a number of stout ships as probably this company would have employed, perhaps so far as 100, had success attended their fishery. By the great number of good seamen of whom this fishery is allowed to be an excellent nursery, the company actually employing annually 950 to 1100, besides those employed at the dock in sail-making, and in the rope-yard, cooperage, &c.

The 8 Geo. 2. c. 28. authorised the importation of whale fins, oil, or blubber of whales, seal-oil, seal skins, or any other produce of seals, or other fish or creatures taken in Greenland seas or Davis's Straits, or in any other parts of the seas adjoining or adjacent thereto, in British ships, whereof the captain and *one-third* of the mariners were British subjects, without paying any custom, subsidy, or other duty for the same during nine years, on the masters making oath that the fish, &c. were there caught; and this act was continued by 22 Geo. 2. c. 45. and 28 Geo. 2. c. 20. Upon which statute it has been considered that the indulgences granted by the act could not be construed further than to the commodities from the parts particularly described in the act. (1) Immediately before the South Sea company had finally determined to lay aside their Greenland whale fishery, the directors had applied to government for a bounty on the fishery, and though it could not then be brought

(1) 2 Chalm. Col. Op. 232.

about, yet in the following year, 1733, a bounty of 20s. per ton was granted (1) by an act of parliament (2) for the farther encouragement of the whale fishery carried on by his Majesty's British subjects, on all ships fitted out in Great Britain of 200 tons and upwards for the whale fishing, and navigated according to law. Yet though this bounty was afterwards raised to 30s. per ton by 13 Geo. 3. c. 28., there were only from three to six vessels employed in the fishery from 1733 to 1749 (3.) Of this new bounty two ships sent out this year by private adventurers enjoyed the benefit, though not very much to the emolument of those adventurers. Various reasons have been assigned for British subjects not hitherto succeeding in this fishery, and for the greater success of the Dutch therein, viz.; First, in general, the greater frugality of the Dutch, whereby, notwithstanding this our new bounty, they are enabled to undersell us in their oil and whalebone. Secondly, from the manner in which the Dutch carry on this and their other fisheries, for the ship-builder, the cooper, the sail-maker, the rope-maker, the baker, brewer, distiller, and other tradesmen employed in fitting out their ships, generally have each a share in the voyage, so that should it prove a fortunate fishing season, they are sure to be doubly gainers, and even if it should prove a bad fishery, they probably lose but little more than they had gained by supplying the outfit of such year in their respective branches, whereby they are better enabled to proceed in that trade than mere merchants can do without these advantages (4). De Witt, in his Interest of Holland, c. 16, says it is worthy of observation that the Dutch Greenland company made formerly little profit by it, because of the great charge of setting out their ships, whereas now that they equip their ships at the cheapest rate, follow the fishery diligently, and manage all carefully, the train oil and whale fins are employed for so many uses in several countries, and they can sell them with such conveniency, that there are now 15 ships for one that formerly sailed from Holland on that fishery. Thirdly, by the re-exportation of a great part of the produce of such fishery, they are farther enabled to make up the loss of any bad year's fishery; whereas we have never as yet carried on a whale fishery considerable enough to enable us to export any quantity of oil and whale fins, nor

(1) 3 Macph. An. Com. 198, 9.

(2) 6 Geo. 2. c. 33.

(3) 3 Macph. An. Com. 511.

(4) Which economy is now practised in fitting out the fishing vessels at Yarmouth and Billingsgate, all these tradesmen being joint partners with the factor or salesman. Reports on the British Fisheries, 14th July 1785, p. 9, and 1800, pp. 119. 125.

indeed enough to supply ourselves at home. Fourthly, the ancient standing reason of the greater lowness of the interest of money in Holland till very lately (1). There is an account of the Dutch whale fishery for 46 years, ending in 1721 (2). In that space they employed 5,886 ships, and caught 32,907 whales, each of which, one with another being usually valued at £500, makes the value of the whole amount to above 16 millions sterling gained out of the sea, mostly by the labour of the people, the wear and tear of the shipping, the casks and the provisions excepted, which last three articles are also a vast benefit to the public by the excise, &c. paid thereon, as well as to numberless individuals employed in providing them.

In 1736, notwithstanding the very ill success of the late whale fishery of the South Sea company for eight years together, yet this year one ship belonging to private adventurers brought home to London no fewer than seven whales, and 130 Dutch ships were said to have caught this same year 600 whales: so precarious is the whale fishery in the frozen seas of Spitzbergen. In 1740 the bounty granted by (3) 6 Geo. 2. c. 33. of 20s. per ton on ships employed in the whale fishery, was continued by 13 Geo. 2. c. 28. (4) to the 25th of December 1750, and an additional bounty of 10s. per ton was granted on whale fishing ships, to continue during the war with Spain only; during which time it was also enacted, that no harpooner, line manager, boat-steerer, or seaman in that fishery, should be impressed from the said service. From the time this act passed, viz. 1750 to 1770, the English vessels increased from 19 ships and 6,264 tons to 67 ships and 21,328 tons in 1756, and then declined, with slight variations, to 50 ships and 14,775 tons in 1770. The Scotch increased from one ship of 333 tons in 1750, to 16 ships and 4,964 tons in 1755 and 1766, whence it declined through the variations of 15 for three years, 14 for four years, 10 for two years, 8 for one year, and 9 ships and 2,797 tons for the remaining five to 1770 (5). In 1749 (6) the 22 Geo. 2. c. 45. was passed for the encouragement of the British colonies in America in this fishery, and to promote the building of large ships; and it was thereby further enacted, that every ship built or fitted out in any of those colo-

(1) Sir Josiah Child's Discourse on Commerce, Preface.

(2) 3 Macph. An. Com. 199.

(3) 6 Geo. 2. c. 33.

(4) 13 Geo. 2. c. 28. 3 Macph. An. Com. 224.

(5) 3 Macph. An. Com. 511.

(6) Id. 268. 22 Geo. 2. c45.

nies being 200 tons and upwards, and not more than two years old from the first building thereof, setting out from any port of the British American dominions on the whale fishery, manned and navigated according to the navigation acts, and properly fitted and furnished for that fishery, shall likewise be entitled to the said joint bounty of 40s. per ton on her arrival from the whale fishery in some port of Great Britain, on certain further conditions therein stipulated: and that foreign protestants who shall serve three years aboard British whale fishery ships, and shall take the usual qualification oaths, shall be deemed natural-born subjects of Great Britain to all intents and purposes, as far as other foreign protestants can so be, provided the sacrament have been received by them within three months before taking the oaths, in some British protestant congregation, and a certificate thereof produced, signed by the minister and two other witnesses.

In 1751 (1), by an edict of Frederic V. king of Denmark, dated at Copenhagen, the 26th March 1751, Greenland was repeopled by the Danes; the édict expressly prohibiting all persons, as well natives as foreigners, from resorting to the colonies established by us (says the king) "in our country of Greenland, which we have granted to a general and privileged company exclusively, we being hereditary lord of that country, upon pain of seizure and confiscation against all such as shall trade thither in prejudice of the said company's right. The limits shall extend 15 miles on both sides of each colony, including therein all the places lying between the western isles and the bay called in the maps Blackbird Bay." This settlement was chiefly intended for the whale and seal fishery, and for peltry. In the year 1755 (2), by the act 28 Geo. 2. for continuing, explaining, and amending the several acts made for the further encouragement of the whale fishery, &c. it is enacted, 1st, that every ship employed in that fishery shall have on board an apprentice indentured for three years at least for every 50 tons burthen, who shall be accounted as one of the number of men who by law ought to be on board such ship; 2d, that no ship employed in this fishery above 400 tons burthen, shall be entitled to a larger bounty than a ship of 400 tons would be entitled to; 3dly, ships under 200 tons burthen shall hereafter be entitled to the bounty of 40s. per ton as

(1) 3 Macph. An. Com. 283. (2) 28 Geo. 2 3 Macph. An. Com. 306.

well as those of 200 tons and upwards are entitled to it by former statutes.

We have the (1) following account of the Dutch whale fishery in the year 1759, viz. that 133 ships brought home the produce of 435 whales, which may be deemed a good year for that fishery, being somewhat above 3¼ whales for each ship. But the Hamburghers were not so fortunate, who in 16 ships brought home but 18½ whales The year 1762 (2) was very unsuccessful, 16 English ships taking only 9 sizeable whales and 22 very small ones; 14 Scottish taking only 5, and 154 Dutch ships only 43 fish. In 1763 (3) we find the lords of trade and plantations observing in their report to the king upon the advantages to be derived from the territories vested in Great Britain by the peace, that hitherto the British fishermen had been excluded from the fishery of the river Saint Lawrence, and of the coasts and islands of the Gulph of Saint Lawrence, by the treaty of Utrecht, which gave the French the sole right to that most valuable fishery called by them the pêche sedentaire, but that since these coasts had fallen into our hands by the reduction of Quebec, the capture of whales, sea-cows, and seals, &c. was already carried on by British subjects to a greater extent than it ever was by the French. That part of the report which respects the fishery in the Gulph of Saint Lawrence was confirmed by the success of the New England whale fishers, who in the year 1761 employed in it ten vessels of about 100 tons, in 1762 fifteen, and in 1763 above 80 vessels; whereupon the increase of the quantity of whalebone imported from New England to Britain, reduced the price of that article from £500 to £300 a ton. For the encouragement of the whale fishery in the river Saint Lawrence, the fins of whales caught in that river, and on the coasts of British America, were allowed to be imported on paying only the old subsidy directed by the act 25 Car. 2. c. 7. (4) The whale fishery at Greenland proved very indifferent this season; the British ships got very few fish, many of them none at all, and the Dutch got only 117, less than half of their usual number. As some compensation for their disappointment in Greenland, they fell in near the island of Rona, about 40 miles north-east from the island of Lewis, with a small species of whales, and caught 32 of them,

(1) 3 Macph. An. Com. 315.
(2) Id. 357.
(3) Id. 371, 2.
(4) 4 Geo. 3. c. 29. 3 Macph. An. Com. 401.

which were reckoned equal to 5 or 6 sizeable Greenland whales. Thus did the Dutch discover another fishery in our seas, which our own people there had not the means to avail themselves of, by going after the whales, and were obliged to content themselves with now and then making prize of a shoal of them when they got entangled amongst the small inlets among the islands, which sometimes takes place, as appears from Sir John Sinclair's work (1), where it is said that 360 whales were driven ashore in the year 1741, at Northmaven in Shetland, about 100 in 1791, and smaller numbers are usual.

In 1768 the bounties and encouragements held out to the whale fishery were continued till 25th December 1770, by act of parliament (2). Of 124 ships sent in that year by the Dutch to the Greenland whale fishery, five were lost in the ice, and the remaining 119 caught 390 whales (3). In 1771, for the further encouragement of the whale fishery (4), the importation of the fins, oil, and blubber of whales, and the oil, skins, and other produce of seals and other creatures, caught in the Greenland Seas, by vessels of which the captain and at least one-third of the men are British, was permitted free of duty by the 11 Geo. 3. c. 38. Also from 25th December 1771, every British ship of strength sufficient to encounter the Greenland Seas, and manned and provided in a manner proper for the whale fishery, that should proceed in the proper season to prosecute that fishery in the Greenland Seas, Davis's Straits, or the adjacent seas, and return to the port whence she sailed, was entitled to a bounty of 40s. a ton on every voyage for five years, to 30s. for a second term of five years, and to 20s. for a third term of five years; the whole bounties granted by this act expiring on the 25th December 1786. Every vessel of 200 tons was obliged to carry four boats and 30 men, including the master and surgeon, and every ship from 200 to 400 tons to carry one boat and six men for every 50 tons above 200, and every ship to have one apprentice for every 50 tons of her burthen, who is to be reckoned part of her complement of men (5); and as doubts had arisen whether it was lawful to insure the bounty which the vessel was entitled to in the event of her arrival, it was declared lawful to insure such bounty, and to

(1) Sir John Sinclair's Statistical Account of Scotland, v. 12. p. 362.
(2) 8 Geo. 3. c. 27. 3 Macph. An. Com. 477.
(3) 3 Macph. An. Com. 485.
(4) 11 Geo. 3. c. 38. 3 Macph. An. Com. 510, 11.
(5) Ante.

recover it from the underwriters if the vessel should be lost. The same bounties were also granted to British American vessels, not more than two years old, proceeding, after due inspection, from their ports to America, before the first day of May, for the Greenland Seas, and thence to some port in Britain with the produce of their fishery; and for the encouragement of the whale fishery in the Gulph of St. Lawrence and on the American coast, whale fins taken by British subjects were permitted to be imported till 25th December 1786, in vessels navigated according to law, paying no other duty than that called the old subsidy.

The fishery from Great Britain is carried on by ships which are upon an average of 300 tons burthen and carry 54 men, of whom six are apprentices, and is thus a very great nursery of the most hardy seamen. The total tonnage of the 32 ships from England in 1764 was 10,262 tons, and that of the 50 ships in 1770 was 14,778. The blubber imported by the 32 ships was 570½ tons, and by the 50 ships, 2238 tons. The American fishery is carried on by shallops carrying about six men, and in a great measure by the Esquimaux Indians, from whom the American colonists purchase the oil and fins, which are very much inferior to those brought from the Greenland Seas, the oil being adulterated with a mixture of seal and cod oil, and the fins brittle. In 1772, we find from Macpherson's Annals of Commerce (1) that a new method of striking whales, by discharging an harpoon from a swivel gun, was this year tried in the Greenland fishery, and that the Society of Arts, desirous of encouraging every improvement in so important a fishery, gave a premium of 20 guineas to the inventor. An invention of this kind we have seen was made in 1731. That part of the 15 Geo. 3. c. 31., passed in 1775 (2), which relates to the subject of our present chapter, permits vessels, British built and of 50 tons burthen or upwards, belonging to Great Britain, Ireland, or of the islands in Europe subject to the British crown, and navigated by not less than 15 men, three-fourths of them besides the master being British subjects, and prosecuting the whale fishery in the Gulph of St. Lawrence, or on the coasts of Labrador or Newfoundland, and catching one whale at least, to import their oil free of duty; and five premiums, of £500, £400, £300, £200, and £100, were allowed to the five vessels which should bring

(1) Vol. 3. 531.

(2) 3 Macph. An Com 576. 15 Geo 3. c. 31

the greatest quantities of oil. The skins of seals caught by European British subjects were also permitted to be imported free of duty in ships legally navigated. To prevent fishermen and artificers from being lost to the kingdom, by going from Newfoundland to America, the commander of a vessel carrying any such person to America was subject to a penalty of £200; and further, to prevent the fishermen from remaining in Newfoundland, where they generally became robbers or pirates, the employers are directed to retain a part of their wages to be paid them at their return home. By this act the bounties allowed to ships employed in the whale fishery at Greenland or Davis's Straits, were extended to ships fitted out from Ireland. On the discovery that a profitable whale fishery (1) might be carried on in seas south of 44 degrees north latitude, premiums from £100 to £500, to continue for eleven years, were offered by parliament to the five ships, owned and carrying men and apprentices agreeable to the regulations enacted for the Greenland ships, fitted out after the 1st August, by which time the Greenland ships have usually returned to port, and returning to port before the 1st of November, which should bring home the five largest quantities of oil each, being the produce of at least one whale caught by them. One of the few benefits arising to this country, and which may be considered in some measure as a set off against the great injury sustained by it during the American war and from its unfortunate result, was the discovery of the advantages to be derived from the southern whale fishery we have just mentioned (2). The American whale fishers, when they found the whales scarce in their own seas, used to stretch over to the coast of Ireland, and often as far as Africa, Brazil, and even the remote Falkland's Islands, in pursuit of spermaceti whales, the most valuable of the cetaceous tribes. That fishery being given up in consequence of the war, many of the harpooners were induced to enter into the service of British merchants who fitted out vessels for the Newfoundland and southern whale fisheries. For the latter, which was quite a new business in this country, there were equipped 15 vessels of about 170 tons, and each carrying four American harpooners; and though their acquisitions were only about 40 or 50 tons of oil for each vessel, yet the superior quality and the price of it, advanced by the war from £35 to £70 per ton, were sufficient to encourage the merchants to

(1) 3 Macph. An. Com. 589. 16 Geo. 3. c. 47. A.D. 1776.

(2) 3 Macph. An. Com. 590.

perseverance in it. In 1780, it being found necessary to appoint a boundary between the whale fishery in the Greenland Seas and that in the Gulph of St. Lawrence, the 20 Geo. 3. c. 60. (1) fixed the latitude of 59° 30′ as the legal limit between them. In 1782 (2), it being found that the reduction of the bounty diminished the number of vessels employed in the Greenland whale fishery, it was again raised to 40s. per ton; and because in time of war it is difficult to procure the requisite number of men, the ships were permitted to take in men, not exceeding two for every 50 tons of their burthen, at Shetland, and to land them there on their return from the fishery.

We now come to the year 1786,a period memorable in relation to important regulations of the fisheries of Great Britain, then introduced by the parliament. The 26 Geo. 3. c. 41. (3) passed to encourage by whale bounties the *Greenland fisheries*, enacts, that British ships proceeding on the whale fishery shall be visited by an officer of the customs, who shall take an account of the tonnage thereof, and certify his visitation,' examination, and admeasurement to the commissioners of the customs; and if it shall appear by that certificate, that the ship is legally qualified for the voyage, by being navigated by a master and three-fourths British subjects, and hath on board such a number of men, provisions, boats, fishing lines, and instruments, to be used in such fishery, as therein-after mentioned, and if it further appears *by the oath of one or more owners, and of the master or chief officer* (4) of such ship or vessel, written at the foot of such certificate, and made before the principal officer of the customs of such port, or any two of them, the collector whereof to be one, that it is the intention to proceed forthwith thereon, and to import whale fins, &c. into Great Britain, the commissioners, on secu-

(1) 20 Geo. 3. c. 60. 3 Macph. An. Com. 661.

(2) 22 Geo. 3. c. 19. 3 Macph. An. Com. 710.

(3) 26 Geo. 3. c. 41. s. 1. 29 Geo. 3. c. 53. 4 Macph. An. Com. 104, 5. Montefiore's Dict. Fishery. See Lacon v. Hooper, 1 Esp. 347. Post.

(4) This section, as far as relates to the oaths taken by the owners and masters of vessels, is repealed by 58 Geo. 3. c. 15. A. D. 1818, and another oath is imposed of their intention to proceed on the whale fishery in the Greenland seas and Davis's Straits, and for no other purpose of profit except that of getting parliamentary reward offered for discovery of the longitude at sea, or approaching the North Pole, and importing the whale fins, oil, blubber, &c. into Great Britain (sect. 2.): and on taking such oaths, sailing licences and bounties will be granted. (sect. 2.)

rity being given, may grant licence to the ship. The *second* section enacts (1), that every ship of the burthen of 200 tons designed for this fishery, shall have on board 40 fishing lines of 120 fathoms each, 40 harpoon irons, four boats with seven men at the least, including an harpooner, a steersman, and a line manager to each boat, making in the whole 28 men, besides the master and surgeon, with six months provision at the least for such number of men; and every ship of larger burthen an increase of six men, one boat, ten such lines, and ten harpoon irons more for every 50 tons above the said 200 tons, together with provisions in proportion; and every ship which shall be so employed in the said fishery, shall have on board apprentices indentured for the space of three years at the least, who shall not exceed the age of 18 years, nor be under 14 years of age at the time they shall be so indentured, in the proportion of one apprentice at the least for every 35 tons burthen, and one fresh or green man for every 50 tons burthen, which apprentices and fresh and green men shall be accounted in the number of men required to be on board such ship. The *third* section provides, that on the return of such ship to Great Britain, the proper officer of the customs shall certify the condition of such ship and her lading, with his observation thereon, and also the real tonnage of the said ship, and take an account or schedule of the names of the master, mate, and other persons on board, and certify the same; and oath being made before the principal officer of the customs, or any two of them, whereof the collector to be one, by the master and mate, that they did pursuant to the licence proceed on the voyage directly, and have not deviated from the conditions upon which the certificate was granted; and that all the whale fins, oil, and blubber imported were really and *bonâ fide* caught in the said seas by the crew of such ship or vessel only, or with the assistance of the crew of some other British-built ship licensed for the same voyage pursuant to the directions of the act, which oath shall be indorsed on or annexed to the licence; and the schedule, certificate, licence, and oath, shall be transmitted by the collector and comptroller of such port to the respective commissioners where such ships shall arrive, who shall on demand cause payment to be made to the master or owners, or his or their assigns, by the receiver general of that port where such ships shall arrive, a

(1) 26 G. 3. c. 41. s. 2. Montefiore's Dict. Greenland Fishery.

bounty or premium of 30s. per ton, according to the admeasurement of such ship duly certified as aforesaid. The *fourth* section enacts, that no person shall be entitled to receive the bounty aforesaid, unless such ship shall sail from the port whence she cleared on or before the 10th of April in each year, and continue in the Greenland Seas, Davis's Straits, or seas adjacent, endeavouring to catch whales and other creatures, and not depart thence before the 10th of August next following, unless such ship, if 300 tons, be laden with 30 ton of oil or blubber in proportion, and one ton and a half of whale fins, and so on in like proportion to the tonnage for which such ship is entitled to bounty, or be forced by accident to depart those seas, to be verified on oath by the master and mate on her return, before two principal officers of the customs, the collector being one. By section *fifth*, if any ship was fitted out and ready for sailing before the time above mentioned, but was prevented by unavoidable impediment, and shall have sailed before the 25th of April, the commissioners may pay such bounty as if such ship had sailed prior to the 10th of April. The *seventh* section enacts, that owners of ships of not less than 150 tons employed in the fishery, conforming to the rules and forms prescribed, in proportion to their tonnage, shall be entitled to the bounty agreeable to the ship's measurement. By the 8th and 10th sections, no ship above the burthen of 400 tons shall receive a larger bounty than a ship of 400 tons. And by the *eleventh* section, in case any ship shall fall in with any of his Majesty's ships of war, the master shall produce to the commanding officer of such ship of war the ship's log-book; and in case such ship shall put into a foreign port where there is a British consul or officer, the master shall produce such log-book to such British consul or officer, who shall make a memorandum and subscribe as before. And the *thirteenth* section authorises the owners to insure the bounty against the loss of the ship. And the *fourteenth* section provides, that whale fins, oil or blubber of whales, seal oil or seal skins, or any other produce of seals or fish caught in the seas of Greenland or Davis's Straits, or parts adjacent, may be imported duty free; but no articles are to be imported duty free unless the master or mate of the ship importing the same shall first make oath before the collector and another officer of the customs in the port of importation, that all the whale fins, oil, &c. imported are *bonâ fide* the produce of whales caught and taken in the Greenland Seas or Davis's Straits, or seas adjacent, by the crews of

such ships, owned, fitted out, and navigated as aforesaid (1). And persons granting a false certificate for any of the purposes directed by the act, are to forfeit the sum of £500; and any person counterfeiting, erasing, or altering any certificate, or knowingly making use of any false certificate, forfeits · 500, and the certificate is rendered of no effect. The *seventeenth* section provides, that no harpooner, line manager, or boat steerer, belonging to any ship in this trade, and whose name is inserted in a list required by this act, shall be impressed from this service, and may, when unemployed therein, sail in the collier trade, on giving security to return the next season, and common seamen shall be protected from impress till the end of the season after entry (2). The *eighteenth* section declares, that the Greenland Seas, Davis's Straits, and seas adjacent, shall be deemed and extend to the latitude of 50 deg. 30 min. north, and no farther. And the act then provides (3), that the commissioners of the customs for England and Scotland shall, at the beginning of every session of parliament, lay before both houses the number of ships or vessels employed in the said fishery, with their names and burthens, where fitted, and at what port discharged; also what quantity of oil or blubber or whale fins each ship shall have imported.

For the encouragement (4) of the *southern whale* fishery, the following premiums were enacted, to be paid for ten years to twenty

(1) Sect. 15.

(2) *Exparte Broche*, 6 *East*, 238. An apprentice in the Greenland fishery is no otherwise exempted from being impressed than under the general act 13 Geo. 2. c. 17. which exempts all persons from being impressed before the age of 18, and every person who not having before used the sea shall bind himself apprentice to serve at sea for the first three years of such apprenticeship; and Lord Ellenborough said, that the special provisions (s. 17.) against impressing *particular* descriptions of seamen in the Greenland fishery, without naming apprentices, shews that the legislature meant to leave their exemption on the general law of 13 Geo. 2. c. 17.—*Exparte Caruthers*, 9 *East*, 44. The statute 13 Geo. 2. c. 28. s. 5. exempting from the impress service any harpooner, &c. or *seaman* in the Greenland fishery trade, is impliedly repealed by 26 *Geo.* 3. *c.* 41. *s.* 17, which exempts such harpooner, &c. *whose name shall be inserted in a list* required to be delivered upon oath by the owner of the vessel to the collector of the customs, and which also exempts any seaman entered on board any ship intended to proceed on the said fishery in the following season, *whose name shall be inserted in a list to be delivered as aforesaid*, and who shall have given *security*, &c. to proceed, and shall proceed accordingly; for the latter statute superadds the insertion of the seaman's name in such list as a condition precedent to the exemption

(3) Sect. 19.

(4) 4 Macph. An. Com. 105. 26 Geo. 3. c. 50. Lacon v. Hooper, 1 Esp. Rep. 246.

vessels prosecuting that fishery, according to the regulations prescribed, viz. For 15 vessels which should sail between the 1st of May and the 1st of September in each year, and having proceeded to the southward 7 north latitude, and carried on the fishery for whales and other marine animals, should return to Great Britain before the 1st of July in the subsequent year; each of three ships having the greatest quantity of pure oil or head matter £500; each of the three having the next greatest quantities £400; each of the three having the next greatest quantities £300; each of the three having the next greatest quantities £200: and each of the three having the next greatest quantities £100. For five vessels sailing as above, and proceeding to the southward of the thirty-sixth degree of south latitude, and there *bonâ fide* carrying on the said fishery, and not returning within 18 months (1) nor later than 28 months, after the 1st of May in the year of their departure, premiums of £700, £600, £500, £400, and £300, according to the quantity of oil and head-matter. No premium is allowed to any vessel having less than twenty tons of oil and head matter, and the whole must be the produce of whales or other marine animals really caught by the crews of the vessels. The vessels must be British-built, and owned by persons residing in Great Britain, Ireland, Guernsey, Jersey, or Man; and the commanders and three-fourths of the crews must be British subjects; but vessels clearing out from Great Britain may carry foreign protestants who have been formerly employed in such fisheries, on their making oath that they intend to settle in Great Britain as subjects. Each vessel must have one apprentice bound for three years for every 50 tons of her measurement. The vessels may clear out from any port of Great Britain, Ireland, Guernsey, Jersey and Man. A regular log-book must be kept, which must be produced to the commander of every British ship of war met with at sea, and to the British consul, if any, in every port the ship may touch at, and finally must be delivered with attestation upon oath of the truth of the contents to the collector of the customs at the port of arrival. Vessels engaged in these fishing voyages are allowed, upon taking out a licence from the East India company for every voyage, to proceed 15 degrees of east longitude from the Cape of Good Hope, and as far north in the Indian ocean as 30° south latitude; and on taking a licence from the South Sea company, to proceed 50° to the westward of

(1) Altered to 14 months by 28 Geo. 3. c. 20.

Cape Horn, and as far north in the Pacific Ocean as the equinoctial line; but they must neither carry out nor import any other goods than the materials for their fishery, and the produce of it. Foreigners accustomed to this fishery, after having been employed in it during five years out of British ports, and having settled their families in Great Britain, become entitled to the privileges of British subjects, and vessels belonging to such foreigners, after having been five years employed in the fishery, may be licensed as British vessels. The times prescribed by this act for the departure and arrival of 15 vessels engaged in the southern whale fishery, and entitled to premiums, according to the terms of the act, were altered by 28 Geo. 3. c. 20. (1) to between the 1st day of January and the 1st of November for the departure; and to any time before the 1st of September in the next ensuing year for the arrival. The five vessels entitled to another class of premiums by the same act, were in future to sail within the time now prescribed for the 15, and to return before the last day of the year subsequent to that in which they sailed, but so as not to be less than 14 months out. Additional premiums of £800, £700, and £600, were allowed to three of the 20 vessels above mentioned, which should employ four months in fishing to the westward of Cape Horn, and return on or before the 1st of December in the second year after sailing, so as not to be less than 18 months out with the greatest quantities of pure oil or head matter, being not less than 30 tons at the least. Vessels passing the Cape of Good Hope were now permitted to go north as far as the equinoctial, and east as far as 51° east from London, and vessels passing Cape Horn may proceed north to the equinoctial, and west to 180° west from London. They must be provided with licences agreeable to the former act, from the East India company and the South Sea company, and must give bond to the former that no goods shall be taken on board, except stores and necessaries for the vessels and crews, and also submit to be searched when they call at St. Helena. Vessels of not less than 200 tons burthen, intending to pass either of the Capes, may be armed for their defence on obtaining a licence from the admiralty. Foreigners formerly employed in the whale fishery, who might be desirous of settling with their families in this kingdom, for the purpose of carrying on such fishery, were allowed till the 1st of January 1790 to bring their vessels, if built before the 1st of January 1788, not

(1) 28 Geo. 3. c. 20. 4 Macph. An. Com. 170.

exceeding forty in all, and each carrying at least twelve men accustomed to the fishery, and to have licences for using them in the whale fishery only, and to import the oil, &c. free of duty, but not to be entitled to the premiums. Such foreigners, after residing in Britain and carrying on the whale fishery for five years, become entitled, on taking the oaths of allegiance, to the privileges of British subjects, and to registers for their vessels, which thenceforth are entitled to their premiums. For the greater encouragement to such foreigners to establish themselves in this country, each of the eleven first vessels which should arrive were permitted to import 70 tons of oil or head matter, the produce of marine animals caught by the crews, for which the first six were to pay no duty, the next two £5 per ton, and the remaining three £10 per ton, on the owners giving bond, with security to settle themselves and their crews in Great Britain.

The account of the shipping employed in the *Greenland* whale fishery, and the sums expended in bounties after 1770 to 1788, will be found in the work we have so often referred to (1). War appears to have had considerable effect in diminishing the number of the British whale fishing vessels. But the whale fishery of the Dutch, when they are at war with Great Britain, is totally suspended, or carried on under neutral flags. The view of the southern whale fishery from its commencement, (2) quoted in the last-mentioned work, shews the number and tonnage of the vessels employed, the quantity of oil produced by it, and also the bounties paid for the encouragement of it. Till the year 1781, all the vessels belonged to London: and no vessels have ever been fitted out from Scotland for this fishery. In 1789 (3) an act passed to declare vessels employed in the whale fishery in the *Greenland* Seas and Davis's Straits, and sailing on or before the 10th of April, capable of receiving the bounty, though they do not remain in those seas longer than 16 weeks after the day of their sailing from the ports at which they cleared out; and though they may not have obtained the quantity of oil required by the former act. (4) The three vessels entitled to premiums by the 28 Geo. 3. c. 20., for fishing for whales, &c. to the westward of Cape Horn, were not in future to be obliged to remain out longer than 16 months. The acts (5) for encou-

(1) 4 Macph. An. Com. 180.
(2) Id. ibid.
(3) 29 Geo. 3. c. 53. 4 Macph. An. Com. 187.
(4) 28 Geo. 3. c. 20.
(5) 4 Macph. An. Com. 222.

raging and regulating the fishery in the Greenland Seas and Davis's Straits, continued till 25 December 1792. The harpooners, line managers, and boat steerers belonging to the Greenland and Davis's Straits vessels, were exempted from being impressed while sailing in coasting vessels, during the intervals between their whaling voyages, as were also seamen for the current season, after being regularly shipped.

In 1791 (1) a fishery for spermaceti whales on the coast of *New South Wales* was commenced by Captain Melville, commander of the Britannia, a ship belonging to Messrs. Enderby and Sons, the first British merchants who adventured in the southern whale fishery. Having discovered in his passage to Port Jackson with a load of convicts, that the spermaceti whales are more abundant in the seas adjacent to that country than near the coasts of South America, he sailed from that port on a whaling expedition, and was followed by several other vessels, which, like his own, were fitted for the whale fishery, and according to the original destination of their voyages, were to have stretched across the Pacific ocean to the coast of Peru on that pursuit. Captain M. got only one out of four whales that he killed, nor were the other vessels more successful, owing to the very tempestuous weather while they were out. But they were sufficiently encouraged to consider those seas as very favourable for the prosecution of the most valuable branch of the whale fishery.

By the 32d George 3. (2), the acts 26 and 29 Geo. 3., for encouraging and regulating the *Greenland* fishery, were continued in force till the 25th December 1798, with the following alterations: The bounty was reduced to 25s. per ton, to continue at that rate from the 25th December 1792 to 25th December 1795, and thenceforth till the expiration of this act to 20s. per ton; a limited number of harpooners, line managers, boat steerers, and seamen belonging to vessels employed in the whale fishery, were exempted from being impressed in the intervals of their voyages. The whaling boats are declared not liable to seizure, though of a construction fitted for the purposes of smuggling, if laid up after the fishing voyages in the places appointed (3).

(1) 4 Macph. An. Com. 227.

(2) 32 Geo. 3. c. 22. 4 Macph. An. Com. 233.

(3) 32 Geo. 3. c. 22. s. 6. and see 55 Geo. 3. c. 45. s. 6.

In 1793 (1), by 33 Geo. 3. c. 52. vessels engaged in the *southern whale* fishery, and licensed agreeably to former acts (2), have the liberty of passing Cape Horn, and sailing to the northward of the equator, and as far west as 180° of longitude from Egypt. By the (3) 33 Geo. 3. the same premium formerly allowed to vessels engaged in the southern whale fishery, and permitted to sail in the Pacific Ocean only as far north as the equator, was extended to those which in virtue of the recent act for renewing the East India company's exclusive trade should sail beyond it.

By the 34 Geo. 3. (4) it was enacted, that in consideration of the difficulty of procuring the full complement of men required by law to be mustered on board vessels fitted out for the whale fishery in the *Greenland* Seas and Davis's Straits at the port of outfit, such vessels are allowed to sail with a deficiency of three men for every 50 tons of their burthen, and to fill up their complement in the firth of Clyde, Loch Ryan, Lerwick in Shetland, or Kirkwall in Orkney. On their return, those men may be landed at their respective homes, and on producing a certificate from the officers of the customs at the ports where they were landed, of the number of men who were on board, the vessels are entitled to the bounty, as much as if the men had been on board during the whole voyage.

In 1794 (5), the merchants of London concerned in the whale fishery in the *Pacific Ocean*, presented a memorial to the committee of the privy council for trade, setting forth the hardships seamen are liable to in long voyages from the want of land air, fresh food, &c., and requesting that a proper officer might be appointed to discover the best harbours near the fishing grounds in the Pacific Ocean, where their vessels might be refitted, and the seamen refreshed, without begging the favour or incurring the jealousy of the Spaniards, who clogged the indulgence they afforded to the whalers of taking in wood and water, &c. with so many restrictions as to be scarcely beneficial, and who were expected to withdraw entirely. Captain Colnett, one of Captain Cook's officers, after a voyage for the purpose, reported the following islands as the most proper for vessels employed in the fishing for

(1) 4 Macph. An. Com. 273. 33 Geo. 3. c. 52.
(2) Ante 346.
(3) 33 Geo. 3. c. 58. 4 Macph. An. Com. 280.
(4) 34 Geo. 3. c. 22. 4 Macph. An. Com. 296.
(5) 4 An. Com. 329

whales, especially the spermaceti kind, to stop at to refit or procure wood, water, or refreshments, viz. Staten island, near the south extremity of America; Mocho Island; Lobos Island; the cluster called the Gallapagos, supposed to be the general rendezvous of the spermaceti whales for bringing forth their young; and in particular James Island, as having greatest plenty of water; the island of Cocos Socoro and Quibo, which last is rather too near the Spanish shore.

The bounties for the encouragement of fitting out vessels for the *southern* whale fishery, allowed to a limited number of vessels, were altered as follows, by 35 Geo. 3. (1) viz. To each of the five vessels of those cleared out between the 1st of January and the 31st of December, proceeding to the southward of the equator, and returning into port before the 31st of December in the ensuing year, which have the greatest quantities of pure oil or head matter, from whales or other creatures, not less than 20 tons in every such ship or vessel, £300. To each of the five having the next greatest quantities, £200. To each of the five having the next greatest quantities, £100. To each of the five vessels sailing in the time before mentioned, proceeding beyond the 36° of south latitude, and, after having been 14 months out, returning before the 31st of December of the second year after clearing out, having the greatest quantities, £400. Competitors for the above premiums must have at least 20 tons of pure oil and head-matter. To the one vessel sailing in the time before mentioned, proceeding to the Pacific Ocean, continuing four months there upon the fishery, and, after being 16 months out, returning before the 31st of December in the second year after clearing out, having the greatest quantity of pure oil and head-matter, £600. To each of the seven vessels acting as the one last-mentioned, and having the next greatest quantities, not being less in the whole than 30 tons to each vessel, £500; and vessels complying with the conditions, &c. of the act, need not be specially cleared out for the latitudes specified; and every such ship shall be navigated by three-fourths subjects; or if clearing out from a port in Great Britain, by foreign protestants, on taking the oath of allegiance, and making another oath before the collector and another principal officer of the customs at the port of clearing out, on their first voyage, that they intend to settle in Great Britain as subjects; on their second or subsequent voyage, that they have

(1) 35 Geo. 3. c. 92. 4 Macph. An. Com. 346, 7.

actually so done, and taken the oath of allegiance. The eighth section provides that no premium shall be paid on account of any ship employed in these fisheries, unless such ship shall have on board an apprentice, indentured for three years at least, for every 50 tons burthen, every such apprentice not exceeding the age of 18 years nor being under 14 years at the time he shall be so indentured, and having proceeded on and continued the whole of the voyage, both out and home, for which any such premium shall be claimed, unless such apprentice died or deserted during such voyage, to be verified on oath of the master, mate, and two mariners, or by the oaths of the master and mate at the port of return; and masters permitting apprentices to quit their service before the expiration of the term of binding, forfeit £50 for each offence, except he be discharged before some magistrate, or turned over from one party to another concerned in the fisheries, to serve the remainder of his time therein. The name of the ship on board which to serve must be in every indenture of apprenticeship before the premium can be received (1), and an apprentice whose time expires during a voyage shall be considered an apprentice for the whole voyage (2). To entitle a vessel to the bounties, a log-book must be kept on board, and the time and latitude of taking whales must be delivered to, and verified on oath before the collector of customs at his port of discharge (3). In case any such vessel shall meet any ship of war, the master shall produce the log-book for the purpose of the commander of the king's ship making a memorandum of the time of shewing the same to him, and the same in any port where there is a British consul or other chief British officer (4). The master and mate, or the master and mate and two mariners, where the latter can be procured, of the ship, must declare on oath, on the importation of any oil or head-matter into Great Britain from the said fishery, before the collector and another principal officer of the customs, from what port and at what time the ship cleared out, and that the oil and head-matter is the produce of whales and other creatures actually killed by the crew of such ship only, at the times and latitudes in the log-book described (5); and any master, &c. knowingly receiving on board any oil or head-matter not *bonâ fide* caught by crew of his ship, shall forfeit £500 to the person informing within a month of the ship's being reported at the customs, and any sum due

(1) Sect. 9.
(2) Sect. 10.
(3) Sect. 11.
(4) Sect. 12.
(5) Sect. 13.

from the owner to the master must be paid by them towards the penalty by him incurred, or else account to the collector for any sum paid to the master (1). Oil or head-matter of whales caught northward of the equator, or 36 south latitude, or in any part of the Atlantic by a ship doubling Cape Horn, is to be considered as part of the oil and head-matter to entitle the vessel to the bounty, &c. (2). It is also provided that the commissioners of the customs in England and Scotland shall pay the premiums (3); and that none shall be paid except claimed within two months in writing, and the payment is to be made within a month after such claim (4). A licence from the East India company was necessary to sail to the eastward of the Cape of Good Hope and westward of Cape Horn, and a bond in penalty of £2000 was required to be taken against any other merchandize being put on board, except stores, &c. (5): all ships exceeding the limits fixed by this act (6), unless driven by stress of weather and returning with all possible speed, or licensed ships taking on board merchandize, were declared liable to forfeitures, as within the limits of East India company's exclusive trade (7).

The same act provides, that if any persons not exceeding 40 families, not being subjects of his Majesty, and heretofore employed at least three years in carrying on the whale fishery, and being owners of any ship, intending to reside in this kingdom with their families, not exceeding 40 in the whole, for the purpose of continuing to carry on such fishing from thence, should, before the end of the year 1798, come to the port of Milford, in the county of Pembroke, with their families, and with their vessels, not exceeding 20 in number, built before the 1st January 1795, and each of them manned by at least 12 seamen or fishermen accustomed to the fishery, they should be allowed to import their goods, furniture, and stock, without paying their duty, and their oil, head-matter, whale fins, and other produce of their fishery, on paying the duties payable by British fishermen, and giving security for their residence at least three years in Great Britain (8). They (9) were also allowed, on taking oaths of allegiance to his Majesty, to have their vessels registered

(1) Sect. 14.
(2) Sect. 15.
(3) Sect. 16.
(4) Sect. 17.
(5) Sect. 21.
(6) Sed vid. post, 42 Geo. 3
(7) Sect. 22.

(8) 35 Geo. 3. c. 92. s. 36. 4 Macph. An. Com. 347. As to a regulation of this nature, see 4 Macph. A. C. 344. in notes.

(9) Sect. 37. 4 Macph. An. Com. 347. et vid. post, 51 Geo. 3. c. 34. s. 8. and 52 Geo. 3. c. 103.

when fitted out for whaling voyages, and were thereupon entitled to the premiums granted to British fishermen, and in general to all the rights and privileges of natural-born subjects.

The premiums for the encouragement of the Southern whale fishery (1) were further regulated by the 38 Geo. 3. c. 57. viz. to each of the four vessels of those cleared out between the 1st of January and the 31st of December in the years 1799, 1800, and 1801, proceeding to the southward of the equinoctial line, and returning into port before the 1st of December in the year subsequent to that in which she was cleared out, which should have the greatest quantity of pure oil or head-matter, £300. To each of the four having the next greatest quantity, £200. To each of the four having the next greatest quantity, £100. And to each of the four vessels sailing within the above mentioned time, and proceeding beyond the 36th degree of south latitude, carrying on the fishery, and after being 14 months out returning before the 31st of December in the second year after clearing out, having the greatest quantity of pure oil and head-matter, £400. To the one vessel sailing within the time above mentioned in the year 1799, or the six following years, proceeding beyond Cape Horn, and fishing four months in the Pacific Ocean, or beyond the Cape of Good Hope, and carrying on the fishery during four months to the eastward of 105° of east longitude from London, and after being sixteen months out returning before the 31st of December in the second year after clearing out, with the greatest quantity of pure oil and head-matter, £600. To each of the nine vessels acting in all respects as the one last mentioned, and having the next greatest quantities, £500.

The vessels fishing in the South Atlantic Ocean must have at least 20 tons of pure oil and head-matter, and those fishing beyond Cape Horn or the Cape of Good Hope, must have at least thirty tons, to entitle them to the premiums, and the whole must be the produce of whales or other marine animals actually taken by the crews of the vessels. The vessels passing the Cape of Good Hope are now permitted to extend their cruise beyond 51° east longitude from London, but must not go to the northward of 15° south latitude, anywhere between the longitudes of 51° and 180° east longitude from London, and those passing Cape

(1) 4 Macph. An. Com. 444. 38 Geo. 3. c. 57.

Horn must also avoid that part of the ocean comprehended within those limits. The encouragements held out by 35 Geo. 3. c. 92. (1) to foreign fishermen, not exceeding 40 in number, to settle with their families, vessels, &c. was continued, and the time allowed for their arrival was extended to the 31st December 1805, and their vessels to the number of 20 were admissible, if built before 1st January 1798. The act 38 *Geo. 3. c.* 76. (2) Table A. imposed a tax of 16s. 10d. per ton, containing 250 gallons, on all train oil or blubber, fish oil, or oil of seals, or other creatures living in the seas, not otherwise enumerated or described.

In 1799 (3), the act for the support and encouragement of the fisheries in the Greenland Seas and Davis's Straits (as amended by the act 32 Geo. 3. c. 22.) was continued till 25th December 1800, by 39 Geo. 3. c. 101. This year was remarkable for great success in the Greenland whale fishery (4). The Hull ships, in particular, caught a prodigious number of whales and seals, and also some bears and sea unicorns. Nor was the unusual abundance of whales confined to the Greenland seas; about 200 small ones, from eight to twenty feet long, ran themselves aground at Tresta Sound, in Fetlar one of the Shetland islands, and afforded a good prize to the natives. The 40 Geo. 3. c. 45. (5) continued the act for the encouragement of the Greenland fishery till 25th December 1801. The act 38 Geo. 3. c. 76. (6), which we have seen imposed a duty of 16s. 10d. per ton on the importation of the oil or blubber of whales, &c., being found to lay a very unequal burthen on the Greenland whalers, whose practice it is to bring home the blubber, to be afterwards boiled down to oil; whereas the Southern whalers, in the course of their long passage homeward, manufacture their oil on board; it was now enacted, that the former should pay the duty according to the quantity of oil obtained from the blubber after their arrival. By 43 Geo. 3. c. 90. (7), any ship or vessel fitting and clearing out, and licensed conformably to the preceding acts, and sailing to the eastward of the Cape of Good

(1) 35 Geo. 3. c. 92. 8 Geo. 3. c. 57.

(2) 38 Geo. 3. c. 76. and see 4 Macph. An. Com. 495. post.

(3) 4 Macph. An. Com. 477, 8. 39 Geo. 3. c. 101. & c. 35.

(4) 4 Macph. An. Com. 486.

(5) 40 Geo. 3. c. 45. 4 An. Com. 494.

(6) 38 Geo. 3. c. 76. 4 Macph. An. Com. 495. A. D. 1798.

(7) 43 Geo. 3. c. 90. Montefiore, tit. Fishery. See also 42 Geo. 3. c. 18. 45 Geo. 3. c. 34. 2 Marsh. Rep. 440. Gill v. Dunlop; and see further extension of limits, 51 Geo. 3. c. 34. s. 5. post.

Hope, and having passed beyond 123 degrees east longitude, may pass to the northward as far as one degree of northern latitude, but no further to the northward until such ship or vessel shall have sailed or passed to the eastward of 180 degrees east longitude from London. The 42 Geo. 3. c. 22. (1), introduces certain conditions on which a proportion of the harpooners in the Greenland and Davis's Straits fisheries shall be protected from impress, and continued the provisions of the several acts in the note. Another act (2) was also passed in this year, to enable British-built ships to pass the Straits of Magellan or round Cape Horn, in order to carry on the fisheries in the Pacific ocean without licence from the East India or South Sea companies. By statute 42 Geo. 3. c. 104. (3) the act (4) relating to foreign fishermen residing at Milford Haven is extended to December 31, 1805. If any person whatever shall knowingly give or grant any false certificate or certificates for any of the purposes of this act, such person shall forfeit £500, and be rendered incapable of serving his Majesty in any office whatever; and if any person shall counterfeit, erase, alter, or falsify any certificate, he shall for every such offence forfeit £500, and every such certificate shall be invalid. s. 38. The 45 Geo. 3. (5), gave a bounty of £600 to the first of ten other ships fitted out under the existing regulations of the southern whale fishery, doubling Cape Horn, or passing the Straits of Magellan, &c., and returning in not less than sixteen months; £500 each to the other nine; gave certain protections to apprentices in such fisheries; and extended the benefits of the 35 & 38 Geo. 3. to ships returning from the fishery to ports in Ireland. In 1810, an act (6) passed to continue the acts therein mentioned relating to Greenland and Davis's Straits fisheries, till 25th March 1815. In 1811 (7), an act passed to continue the 38 Geo. 3. c. 57. for encouraging the southern whale fisheries,

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(1) 42 Geo. 3. c. 22. s. 2. A. D. 1802, continuing 26 Geo. 3. c. 41. 29 Geo. 3. c. 53. 32 Geo. 3. c. 22. as continued by 41 Geo. 3. c. 97. till 25 Dec. 1804.

(2) 42 Geo. 3. c. 77. sed vid. 53 Geo. 3. c. 155. s. 32. post.

(3) Montefiore, tit. Fishery. 42 Geo. 3. c. 104.

(4) Ante, 352.

(5) c. 34. 41 Geo. 3. c. 96. 35 Geo. 3. c. 92. 38 Geo. 3. c. 57. & 42 Geo. 3. c. 18. s. 1.; the whole of these provisions were continued by 48 Geo. 3. c. 124.

(6) 50 Geo. 3. c. 11. and see c. 108. and 1 M. & S. 223.

(7) 51 Geo. 3. c. 34.

and to give premiums to sixteen vessels under the limitations of that act and of the 35 Geo. 3. c. 92. (1)

The 52 Geo. 3. (2) enacts, that ships shall not lose the benefit of fishery, though the master and mariners thereof may not have taken the oaths required of foreigners; and it being expedient to annul the remaining necessity of taking any particular oaths by foreign mariners, except that of allegiance by the master, another act was passed (3), entitled "An Act for the more easy manning of ships employed in the Southern whale fishery," which repealed the last-mentioned act, only imposing the oath of allegiance on the master to entitle him to the benefit of the bounties under 35 Geo. 3., &c. The great East India act of the 53d of the King (4) extended the permission to the southern whale vessels to sail in all seas east of Cape of Good Hope, and westward of Magellan, according to the 35 Geo. 3. (5) but appoints limits within which, for the protection of the East India Company's trade, no vessel must pass without a licence from the India Board of Directors, restrains all vessels less than 350 tons burthen from passing east of Cape of Good Hope or west of the Straits of Magellan, and points out several places where whale ships may not touch without such licences. The 55th of the King (6) continued the premiums given by the 51 Geo. 3. (7) and 35 Geo. 3. (8) till the 31st of December 1819, and gave £300 premium for each of eight ships annually sailing to the southward of the equator, and there carrying on the fishery, and bringing home not less in all than 20 tons of oil: £400 each to four ships so employed to the southward of 36 degrees of south latitude: £600 to any one of ten ships, which doubling Cape Horn and remaining four months to the west, or doubling the Cape of Good Hope and remaining to the eastward of 105 degrees of east longitude from London during the space of four months, shall bring home the greatest cargo of not less than 30 tons of oil: £500 to each of the other nine vessels which shall so sail and arrive and bring home the next greatest quantity, not less in the whole than 30 tons. The same act (9) gave the benefits of the 35th and 51st of the King

(1) 35 Geo. 3. c. 92.
(2) 52 Geo. 3. c. 103. A. D. 1812.
(3) 53 Geo. 3. c. 111. A. D. 1813.
(4) 53 Geo. 3. c. 155. s. 32.
(5) Ante, 352.
(6) 55 Geo. 3. c. 45.
(7) 51 Geo. 3. c. 34.
(8) 35 Geo. 3. c. 92.
(9) Sect. 5.

to any ships returning to any port in Ireland, as if such ships had returned to any port in Great Britain.

It has been observed (1) that the Greenland fishery of England has been upon the decline, whilst that of Scotland has been on the advance the last few years, and the southern whale fishery is stationary. The great and increasing importation of tallow, the depreciation in the price of whalebone, and the impress of seamen in time of war, have all tended to cause the decay in the Greenland fishery; that of the South Sea is encouraged by high bounty, yet still it has not increased, although it has been prevented from decay. Two millions of money have annually been drawn from this country in payment to Russia for tallow imported. (2)

With regard to the *customs* of the whale fisheries, we find it laid down in Macpherson's Annals of Commerce (3), that in the South Sea fisheries when two ships strike the same whale, one with a loose harpoon and the other pursues and kills it, it is by custom of that fishery divided between them. The customs of the whale fisheries were much canvassed in the case of Fennings and others *v.* Lord Grenville (4), which was an action of trover for a whale, half a whale, and certain quantities of whale flesh, blubber, oil, spermaceti, and whalebone. It appeared on the trial at Guildhall before Mansfield, C. J., A. D. 1807, that the plaintiffs were owners of the William Fenning, and the defendants of the Caerwent, both being ships employed in the year 1805 in the southern whale fishery among the Gallapagos Islands. While the captain of the plaintiffs ship was engaged in killing a whale, he struck another one of a shoal with an harpoon, made fast by a short line or warp to a small buoy called a drong. The wound caused the fish to struggle with the harpoon for a considerable time, and the drong floating on the water marked its course, so that it was with the more certainty followed and killed by the master of the Caerwent. They extracted from it the oil and valuable matter, but rendered no part to the plaintiffs. Numerous witnesses deposed that a custom had universally prevailed in these seas, from the origin of the fishery till a very few years past, that the party who first struck the fish with the drong should receive

(1) 3 Adolph. 279.
(2) Oddy, 24.
(3) Vol. 3. 131. note A. D. 1725.
(4) Fennings and others v. Lord Grenville, 1 Taunt. 241.

one half of it from the party who killed it; other witnesses swore that since 1792, many captains of ships employed among the Gallapagos Islands, among whom was an American, had usually agreed, that striking a fish with a drong should not entitle the striker to a share. In 1805, the master of the Caerwent and five or six English captains, of whom the master of the William Fenning was not one, had acceded to these terms, on their arrival at the fishing station. But the plaintiff obtained a verdict for the value of a moiety of the fish. It appeared in the argument (1) on shewing cause against the new trial, that the custom of the Greenland trade is exactly the reverse of that in the Southern whale fishery. There, while the harpoon remains in the fish, and the line continues attached to it, and also continues in the power or management of the striker, the whale is what is termed a fast fish; and though, *during that time*, struck by an harpooner of another ship, and she afterwards breaks from the first harpoon but remains fast to the second, the second harpoon is called a friendly harpoon, and the fish is the property of the first striker and of him alone. But if the first harpoon or line breaks, or the line attached to the harpoon is not in the power of the striker, the fish is a loose fish, and will become the property of any other person who strikes and obtains it; and Chambre J. observed, that there must of necessity be a custom in these things to govern the subjects of England as well among themselves as in their intercourse with the subjects of other countries. The usage of Greenland is held to be obligatory, not only as between British subjects, but as between them and other nations. He remembered the first case upon that usage, which was tried before Lord Mansfield, who was clear that every person was bound by it, and said, that were it not for such a custom, there must be a sort of warfare perpetually subsisting between the adventurers, and he held it strongly binding from the circumstance of its extending to different nations. The same necessity must prevail in the South Seas, although the fishery has not been so long in use, in order to regulate our intercourse with the French, Americans, and others who resort thither; a few persons may by compact among themselves, for a particular season, renounce any advantages, and subject themselves to any disadvantages that they please, and this would bind all those who assented to it; but the plaintiff's master was no party to this compact, and therefore was entitled to recover.

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(1) Littledale and others v. Snaith and others, 1 Taunt. 242.

In the case of Lacon and others v. Hooper and others, it was decided (1) that the word "*months*," mentioned in the 28 Geo. 3. c. 20. (2), passed to amend the 26 Geo. 3. c. 50. means lunar and not calendar months. Thus the time for ships engaged in the southern whale fishery to be out on their voyage in order to gain the premiums under the 28 Geo. 3. c. 20. is fourteen *lunar* months from the time of their clearing out, without regard to the time of their actual sailing. The case of Wilkinson v. Frazier (3) decided a point of great importance to the sailors engaged in the whale fishery; viz. that where a sailor engaged on a whaling voyage, and was to receive a certain proportion of the profits of the voyage in lieu of wages, when the cargo is sold, he may maintain an action of assumpsit on the articles for his wages against the captain, and shall not be considered as a partner.

In a case in which a southern whale and seal fishing vessel, with letters of marque under the act 35 Geo. 3. c. 92. s. 27, 8. (4) had taken several prizes, though her original adventure was the whale fishery, in which she had taken one whale of 36 gallons, and had been latterly employed in the seal fishery, it appeared that the ship's crew was reduced by death and desertion to nine men and a boy between their leaving England in 1805 and August 1807, who were yet sufficient for seal fishing, and navigating the ship to England. They were risen upon by Spanish prisoners they had aboard, made prisoners, and the ship was run away with. It was held (5) that an insurance in August 1807, with retrospect to 1st August 1806, on this vessel, although at the time of her nsurance she was not competent to pursue all the purposes of her voyage, her crew being too much reduced for the whale fishery: yet as she had a competent crew for pursuing one part of her adventure, namely seal fishing, she was deemed seaworthy, and the underwriters liable. It has been also decided (6) that as the statute 42 G. 3. c. 77. (7) authorizes any British vessel to trade as well as to fish on the western coast of South America within the limits therein prescribed, and the 45 Geo. 3. c. 34. (7) gives the same privileges to neutral vessels when licensed, as are given by 42 G. 3. to British ships,

(1) 6 T. R. 224.
(2) 1 Esp. R. 246. ante, 344.
(3) 4 Esp. R. 182. 1 Camp. 300.
(4) Ante, 350.
(5) Hucks and others v. Thornton, 1 Holt, N. P. C. 30.
(6) Gill and another v. Dunlop, 2 Marsh. Rep. 440.
(7) Ante, 355.

therefore a voyage at and from Lima, or any other port or ports of South America, by a Portuguese ship having a licence, was held protected by the two acts; and it was decided, that where the statute requires that the vessel shall carry out an apprentice for every fifty tons, and that it shall be verified by affidavit, the muster roll containing the account of such apprentice, at the sailing and return of the ship, and sworn to as directed, is sufficient proof (1). So in a case (2) where the plaintiff subscribed articles of agreement under seal, between the captain of a ship and the mariners, whereby, in consideration of their serving faithfully in a fishing voyage to the South Seas and back again, they were each to receive a share of the net proceeds of the cargo brought home, and the defendant, as owner of the ship, was appointed agent to dispose of the cargo for the benefit of all concerned; it was held that money had and received would not lie against the defendant to recover the plaintiff's share of the net proceeds on proof that the defendant had disposed of the cargo, and that the price of it had come to his hands, without evidence of an acknowledgment that the plaintiff had done his duty during the voyage, and was entitled to his stipulated share of the proceeds. In the case of Payne and Thorogood (4) it was held that the 50 G. 3. c. 108. which exempts certain persons who shall be employed *in the fisheries of these kingdoms* from being impressed, extends to a lobster fishery carried on by British subjects on the coast of Heligoland for the purpose of supplying the London market with that article; and therefore the court discharged a mariner and an apprentice who had been impressed out of one of the vessels engaged in that fishery. In the case of Hill v. Patten (5) it was held that a policy effected on "*ship and outfit*" on a voyage upon the southern whale fishery out and home, cannot be altered by consent after the ship sails, and the risk attaches, to an insurance on "*ship and goods*," without a new stamp: *outfit*, the subject matter of insurance, being essentially different in such a voyage from goods, and therefore not within the exception of the 35 Geo. 3. c. 63. s. 13. enabling alterations to be made in the terms or conditions of a policy without having a new stamp, so that the thing insured remains the property of the same persons, &c.; and Lord Ellenborough, in tracing the distinction between out-

(1) Lacon v. Hooper, 1 Esp. Rep. 249.

(2) Evans v. Bennett, 1 Campb. Rep. 300.

(4) 1 M. & S. 223. 50 Geo. 3. c. 108. 2 Geo 3. c. 15.

(5) 8 East, 373

fit and goods, said, outfit in a fishing voyage principally consists in the apparatus and instruments necessary for the taking of fish, seals, &c. and the disposing of them when taken in such a manner as to bring home the oil, blubber, bone, skins, and other animal produce of the adventure, with the greatest convenience and advantage. As far as the outfit consists of provisions put on board for the use of the crew, it is, according to Brough v. Whitmore (1), covered by an insurance on ship, being in effect part of the necessary furniture, stores, and equipment of every ship proceeding on a voyage; but outfit, though it may in this qualified sense be considered as part of the ship or ship's furniture, yet it cannot be considered as goods in any proper sense of that word, that is, as part of the wares or cargo, for sale laden on board the ship, still less as part of the homeward bound cargo in this voyage out and home, recollecting that in a fishing voyage the only cargo on board the ship, from first to last, is in general the homeward bound cargo, consisting of the immediate produce and result of the fishing adventure; and in French v. Patton (2), which was an action on the same policy, it was held that an erasure having taken place by consent of the parties, it could not be recovered on as an insurance on ship and outfit as it originally stood, without a new stamp.

The *Newfoundland fisheries* were discovered by Sebastian Cabot, about 1497, for England, though some contend that the bank was discovered a century earlier by the Biscayners (3). The first colony settled by this country there was in 1610 (4), for the purpose of making a station for the fishery, though the trade there had been the object of the protection of the government in the reign of Edward the 6th (5), when an act was passed, that the admiralty should not exact any thing of those who resorted to Iceland or Newfoundland for the purposes of fishing. By an act in the reign of Charles the 2d (6) no toll or duty was allowed to be taken at Newfoundland for any fish caught there, and a penalty was imposed on destroying stores there (7). The statute 10 & 11 Wm. 3. (8) gave a free trade to

4thly, Of the Newfoundland Fisheries.

(1) Brough v. Whitmore, 4 T. R. 206.
(2) 9 East, 351.
(3) 2 Macph. Ann. Comm. 13. notis.
(4) 2 Macph. Ann. Comm. 260.
(5) 2 & 3 Edw. 6. c. 6.
(6) 15 Car. 2. c. 15, 16. 2 Macph. Ann. Comm. 512.
(7) Sect. 2.
(8) 10 & 11 W. 3. c. 25. A. D. 1699. 2 Macph. Ann. Comm. 706. Reeves' Treatise on Newfoundland, 31. See 2 Chalmers'

Newfoundland; appointed the first three ships arriving on the fishing banks from England to be fishing admirals to command the rest, and decide disputes about places, &c.; it also gave a power of trying murders and other felonies committed in Newfoundland in any county in England. Whale fins, oil and blubber of whales, caught by English fishermen on the coast of Newfoundland, are put on a footing with Greenland whale fins, &c. and exempted from duty on importation; and every byeboat keeper was required to carry out two fresh men in every six, one of whom had never been at sea before, as was every master of a fishing ship for every five he should carry. It has been considered that the justices of the peace in Newfoundland had not, under the statute 10 & 11 Wm. 3. sufficient authority to raise money for building a prison or repairing a church, by laying a tax upon fish caught or upon fishing boats, the rather because that statute directs that the trade shall be free; but that, as the justices of the peace in Newfoundland are by their commission to act according to the laws of England, they should observe the English regulations in the 11 & 12 W. 3. c. 19. by which they are enabled to make an assessment for the purpose, after a presentment made by a grand jury. It was also considered, that for any assault on magistrates, or destruction of stocks or prisons, the parties might be indicted, but that the justices could not decide differences relating to property, their power being restrained to criminal matters (1). The king may also by his prerogative, by commission under the great seal, grant express power to erect courts in Newfoundland for the trial and punishment and execution there of all sorts of crimes, except treason committed there, although the thirteenth article of the 10 & 11 W. 3. authorizes the king to cause capital crimes committed there to be tried in England (2). It has also been advised that the king cannot enter into arrangements with a foreign state affecting the provisions in the statute of W. 3. (3)

The 2 & 3 Ann. (4) provides that the allowance (5) granted on exportation of cod fish, &c. shall only be made on oath of its

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Opinions, 233 to 246, as to the jurisdiction of these fishing admirals and of justices of the peace in Newfoundland.

(1) Opinion of Attorney General York, 2 Chalm. Col. Op. 233 to 235.

(2) Opinion of Attorney General Ryder, 2 Chalm. Op. 239. 241.

(3) 2 Chalm. Op. 243.

(4) 2 & 3 Ann. c. 14. 4 Ann. c. 12. s. 12. as to north sea cod, &c.

(5) Ante, 295.

coming from Newfoundland or Iceland, and on the fish being tendered to the officer of the port, to cut part of its tail off as a certificate thereof. By the treaty of Utrecht (1) a concurreut fishery and right of drying fish, &c. was conceded to the French, who yielded the Newfoundland territory, and the town and fortress of Placentia, to Great Britain; and by the treaty of Paris (2) the same liberty was granted to them within the limits and in the manner in the thirteenth article of the treaty of Utrecht mentioned, as well as a liberty of fishing in the Gulph of Saint Lawrence at three leagues from shore, and in the sea adjacent to Cape Breton, and on the coast of Nova Scotia, as in former treaties. By the treaty of peace of 1814, between Great Britain and France, it is declared, that the French right of fishery upon the great bank of Newfoundland, upon the coasts of the island of that name, and of the adjacent islands in the Gulph of Saint Lawrence, shall be replaced on the footing in which it stood in 1792, before the war broke out; that is, on the footing settled by the treaties of Utrecht and Paris. (3)

In 1765 (4) it seems to have been considered that the establishment of a settled colony on Newfoundland was injurious to the trade from Great Britain, and regulations were accordingly made by Commodore Palliser the governor, to ratify the settlements and property in the island by law, except the portion of the coast where the concurrent fishery by French as well as British subjects was stipulated by the treaties of Utrecht and Paris. By 13 Geo. 3. (5) cod, ling, and hake, caught and cured in the Gulph of Saint Lawrence or on the Labrador coast, may be freely imported into Great Britain.

The act 15 Geo. 3. c. 31. (6) afforded the first premiums or bounties to the Newfoundland fisheries; namely, of £40 to each of the first 25 vessels, of £20 to each of the next 100 vessels, and of £10 to each of the next 100 landing, on or before 15 July in each year, between Cape Ray and Cape de Gar, a cargo of at least 10,000 fish, and proceeding to the banks for a

(1) Articles v. & xiii. 3 Macph. Ann. Comm. 28. A. D. 1712.
(2) 3 Macph. Ann. Comm. 366. Articles v. & vi. A. D. 1763.
(3) Pope tit. lxix. France, 13.
(4) 3 Macph. Ann. Comm. 422, 3, 4.
(5) 13 Geo. 3. c. 72. s. 1. 41 Geo. 3. c. 77. 46 Geo. 3. c. 103. 47 Geo. 3. st. 1. c. 34. 48 Geo. 3. c. 29. s. 3.
(6) 15 Geo. 3. c. 31. 3 Macph. Ann. Comm. 576.

second cargo. The vessels must be British-built, of 50 tons burthen or upwards, belonging to some of the British European islands, and manned by not less than fifteen men, three-fourths of whom are to be British subjects; such bounties to continue till 1st January 1787. Vessels owned and manned as above directed, and prosecuting the whale fishery in the Gulph of Saint Lawrence, or off the coasts of Labrador or Newfoundland, and catching one whale at least, might import their oil free of duty; and five premiums of £500, £400, £300, £200, and £100, were given to the ships having the greatest quantities of oil; a penalty of £200 was imposed on the commander of any vessel for carrying fishermen, &c. to America; and to prevent the fishermen from remaining in Newfoundland, part of their wages was to be retained, to be paid on their return home: but this act appears quite dormant, and in 1793 (1) was petitioned against by deputies from the whole body of Newfoundland merchants, as very injurious to the trade, and that they would gladly throw up the bounty to be relieved from the litigations and inconveniences produced by the act; and only one instance occurred of a bounty being paid in the course of nine years, which took place at Exeter in 1778. It was afterwards remodelled and renewed by 26 Geo. 3. c. 26. (2). The 25 Geo. 3. c. 1. was passed to allow bread, flour, and live stock to be imported into Newfoundland from the United States, with licences to be furnished by the commissioners of the customs in Great Britain, only till the 30th June 1785, and was continued in 1785 till the 30th June 1787. (3)

The 26 Geo. 3. c. 26. (4) renewed the 15 Geo. 3. with increased bounties; for each of the first hundred vessels, £40 on wages, £50 wholly on shares in those carrying 12 or more men, and £25 on wages, £35 wholly on shares in those carrying from seven to eleven men; the vessels to be British-built, and owned as in 15 Geo. 3., but no limitation of tonnage as in that act; no nets with meshes of less than four inches are to be used, under a penalty of £100. The fishermen of Newfoundland were strictly prohibited from selling vessels or any thing belonging to them, fishing tackle of any kind, bait for fishing, or any produce of the island or of the fisheries, to any foreigners. In 1789 (5)

(1) 3 Macph. Ann. Comm. 576. (n.) & 722.
(2) Infra.
(3) 4 Macph. Ann. Comm.
(4) 4 Macph. Ann. Comm. 100.
(5) 29 Geo. 3. c. 53. 4 Macph. Ann. Comm. 187.

the liberty of drying fish on the coast of Newfoundland was restricted to vessels sailing from the British dominions in Europe. The account of the produce of the fisheries at Newfoundland from 1784 to 1792, will be found in the fourth volume of Macpherson's Annals of Commerce (1). The act 26 Geo. 3. (2) for granting bounties to the Newfoundland fisheries was successively continued by the acts mentioned in the note. By 27 Geo. 3. it is provided (3), that no vessel whatever not exceeding the burthen of 30 tons, and not having a whole or fixed deck, and being solely employed in the fisheries of Newfoundland and the parts adjacent, shall be subject to be registered pursuant to 26 Geo. 3.; and by 29 Geo. 3. c. 53. (4) no fish are to be landed or dried at Newfoundland, unless caught by subjects of Great Britain, or of the British dominions in Europe. In 1799 (5), notwithstanding the 38 Geo. 3., vessels loaded with the produce of the fisheries, or the island of Newfoundland or Labrador, were permitted to sail from any port of those countries without a convoy. The 46 Geo. 3. (6) gave a bounty of 3s. per cwt. on the importation of salted cod or pickled salmon, which may be re-exported without repayment of such bounty; the rules of paying which are to be subject to the rules of the other British fisheries: this act has been continued by the 47 Geo. 3., the provisions of which act are extended to fish imported from the British North American colonies, as Labrador, &c. by 49 Geo. 3.

The *baits* (7) for the cod fishery are an article of no mean importance. They are the lesser lamprey, the petromyzon fluviatilis of Linnæus; and which have been taken in amazing quantities between Battersea Reach and Taplow Mills, a space of about fifty miles, and sold to the Dutch for the cod and other fisheries; 450,000 have been sold in one season for that purpose; the price has been 40s. the thousand, and £3, £5, and £8 have been given. Formerly the Thames has furnished from 1,000,000 to 1,200,000 annually.

(1) Page 257.

(2) 26 Geo. 3. c. 26. 37 Geo. 3. c. 99. 39 Geo. 3. c. 101, 2. 40 Geo. 3. c. 45. 41 Geo. 3. c. 77, &c.

(3) 27 Geo. 3. c. 19. s. 8.

(4) Montefiore Dict. tit. Newfoundland Fishery.

(5) 4 Macph. Ann. Comm. 471. 39 Geo. 3. c. 32. 38 Geo. 3. c. 76. The convoy act.

(6) 46 Geo. 3. c. 103. A. D. 1806. 47 Geo. 3. st. 1. c. 24. 49 Geo. 3. c. 26. 50 Geo. 3. c. 80.

(7) 3 Adolph. 463.

In an action on a policy of insurance on a Newfoundland fishing ship (1) and her freight and cargo, "lost or not lost," at and from any portor ports, in Newfoundland to one port of discharge in Portugal, or to any port or ports in the United Kingdom; it was decided, that according to the usage of the Newfoundland trade, when ships arrive on the coast, they are either employed for some time in fishing (called banking), or they make an intermediate voyage in the American seas, before beginning to take in their homeward cargo, during which they are protected by a separate policy. Therefore, in effecting a policy, "lost or not lost, at and from Newfoundland to a port in Europe," although the ship is to be employed in "banking," it is not necessary to disclose the fact to the underwriters, as their risk only commences from the time when the banking or intermediate voyage ends, and they are bound to know the nature and circumstances of the branch of trade to which the policy relates; if the usage is general, it makes no difference for this purpose that it is not uniform.

4thly, Of the Pilchard, Salmon, Mackarel, Turbot, Lobster, and Oyster Fisheries (2).

Having thus endeavoured to arrange the law respecting the herring, whale, and Newfoundland fisheries, we will proceed to consider the regulations affecting the pilchard, salmon, mackarel, turbot, lobster, and oyster fisheries.

Of the Pilchard Fisheries.

It is a saying of the Cornishmen, that the pilchard is the least fish in size, most in number, and greatest for gain, that they take from the sea (3). So wonderfully great are their shoals, that often the capture of one day is a prodigious object. In St. Ives' Bay, as many were taken on the 5th Oct. 1767 as filled 7,000 hogsheads, each containing 35,000 fish; the whole of the fish then taken amounting to 245,000,000 (4). The 13 & 14 Car. 2. c. 28. provides for the time pilchards are to be fished for in shore, on penalty, in case of non-observance, of forfeiting the nets, and a month's imprisonment, directs pilchards to be bought of the pilchard adventurers only, and gives a penalty of forfeiture of treble value and three months imprisonment for embezzling any pilchard fish to the prejudice of a company of fishermen by a member thereof; and enacts, that persons flocking about pilchard boats, &c. shall depart on warning, or pay

(1) Vallance v. Dewar, 2 Campbell, 503. See 1 Sess. Cas. 246. Robberies, &c. in Newfoundland.

(2) See division of this subject, ante, 267.

(3) Postlethwaite, tit. Fishery.

(4) 3 Ann. Comm. 637. note.

5s. to the parish, or be set in the stocks for five hours. A drawback of 12s. per 50 gallon cask of pilchards was given on exportation by 5 W. & M. (1). This affords (2) employment to above 3,000 fishermen, besides seamen employed in carrying the fish to foreign markets, which are chiefly the ports in the Mediterranean, and in importing salt, staves, and other materials for the fishery; and 4 or 5,000 people employed in the businesses connected with it on shore. Pilchards are so much in request in the Italian states, that the orders from them for lead, tin, copper, leather, &c. have been often conditional, that if such a quantity of pilchards could not be sent, the other articles could not be received: and the Venetian government allowed British vessels, importing a certain proportion of pilchards, to take in currants at their islands, though the carriage of that fruit was restricted to their own vessels. The annual export of this fish, on an average of ten years from 1747 to 1756, was about 30,000 hogsheads, but it had declined in 1782 to 12 or 13,000 hogsheads. The 5 Geo. 1. c. 18. (3) gave a bounty of 7s. for every cask or vessel of pilchards exported, and further provision for the payment thereof is made by 3 Geo. 2. c. 20 (3). The regulations for conducting the fishery for pilchards in the Bay of St. Ives, on the coast of Cornwall, were remodelled and sanctioned by parliament in 1775 (4). The fishery was so abundant about 1779 (5) that the demand in the foreign markets was insufficient to take off the quantity prepared for exportation; and it became an object of consequence to increase the home consumption. For this purpose the duty on salt used in curing pilchards was entirely taken off, and instead of it a duty of 5s. 2½d. was laid on every barrel containing 50 gallons of cured pilchards. The 25 Geo. 3. c. 59. (6) raised the bounty from 7s. to 9s. on every cask, measuring 50 gallons, of pilchards exported between the 25th of June 1785 and the 25th of June 1786, the fishery having then declined. The 26 Geo. 3. c. 45. (7) continued the additional 2s. bounty till 24th June 1791, under the condition that when more than 20,000 hogsheads are exported in any one year, the additional bounty of 2s. shall be allowed only for 20,000 hogsheads, and that sum shall be divided among the whole

(1) 5 W. & M. c. 7. s. 10.

(2) 3 Macph. Ann. Comm. 637, 723. A. D. 1782.

(3) 5 Geo. 1. c. 18. 3 Geo. 2. c. 26.

(4) 16 Geo. 3. c. 36. 3 Macph. Ann. Comm. 588.

(5) 19 Geo. 3. c. 52. 3 Macph. Ann. Comm. 637.

(6) 25 Geo. 3. c. 59. 4 Ann. Comm. 73.

(7) 26 Geo. 3. c. 45. 4 Macph. Ann. Comm. 105.

exporters, in proportion to the quantity exported by each. The 31 Geo. 3. c. 45. (1) added a still further bounty of 1s. 6d. per cask of 50 gallons on pilchards exported, thus making the bounty 10s. 6d. per cask; and was continued by 37 Geo. 3. (2) and 39 Geo. 3. (3), and to 24th June 1812 by 45 Geo. 3. (4); by which also, (sect. 2.,) pilchards exported directly to the West Indies or the Mediterranean, in casks of 32 gallons or upwards, though less than 50 gallons, are allowed a bounty proportioned to those exported in casks of 50 gallons. The 48 Geo. 3. (5) extended this bounty to pilchards exported to any foreign parts; and commissioners of excise may allow fish to be exported from any place they may think proper, besides the lawful quays, and many regulations respecting salt are also added (6). The quantity of salt for curing pilchards, allowed duty-free on the conditions in the salt acts and 38 G. 3. (7) was increased to 336lbs. of fine salt to a cask of pilchards, which salt was not to be used in curing more than twice by 42 G. 3. c. 93. (8)

Of the Salmon Fisheries.

The trade in *salmon* (9) used to be very considerable from Scotland to Holland. In 1765, by the report of the British consul of the British commerce with Holland, the quantity exported is stated at from 2 to 3,000 barrels of pickled salmon. The general act for the protection of salmon in the English rivers was passed in 1 Geo. 1. (10) The 11 Geo. 3. c. 27. (11) regulated the important salmon fishery of the river Tweed, and allowed no person to kill any species of salmon in that river or its branches between the 10th of October and the 12th of January, nor at any time of the year between twelve o'clock on Saturday night and two o'clock on Monday morning. Taking, or even having in possession, the spawn, fry, or young brood of the fish between the 1st of April and the 1st of June, was also made punishable by fine; as were also laying dirt or rubbish in the river, and disturbing the fish when entering the river.

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(1) 31 Geo. 3. c. 45. 4 Macph. Ann. Comm. 223. A. D. 1791. 45 Geo. 3. c. 102.

(2) 37 Geo. 3. c. 94. 4 Macph. Ann. Comm. 421.

(3) 39 Geo. 3. c. 65. 4 Macph. Ann. Comm. 474.

(4) 45 Geo. 3. c. 102. 50 Geo. 3. c. 80.

(5) 48 Geo. 3. c. 68.

(6) 39 Geo. 3. c. 65. s. 1. 4 Macph. Ann. Comm. 474. Montefiore Dict. tit. Fishery.

(7) 38 Geo. 3. c. 89. s. 104.

(8) 42 Geo. 3. c. 93. s. 20, 21.

(9) 3 Macph. Ann. Comm. 428.

(10) 1 Geo. 1. st. 2. c. 18. A. D. 1714.

(11) 11 Geo. 3. c. 27. 3 Macph. Ann. Comm. 509. and see 15 Geo. 3. c. 46. 37 Geo. 3. c. 48. amended by 47 Geo. 3. st. 1. c. 39.

Macpherson, in his Annals of Commerce, observes (1) that in the year 1782 the exportation of salmon, formerly a very considerable branch of the Scottish trade, was almost entirely destroyed by the consumption of London; and it is thought that the breed of salmon was annually decreasing from the method of conducting the fishery in the Scottish rivers. In 1797 (2), the property of the salmon in the Tweed being injured by interloping fishers, who clandestinely set nets in the river, and others who went out to sea to intercept the fish when coming into the river, the magistrates were directed to order all such nets and other tackle, and also the sloops, boats, &c. found fishing within the bounds of the mouth of the river, to be seized. Its bounds are then settled, and to prevent fishing for salmon when not in season, the proprietors of boats on the Tweed, and other streams running into it, are required to haul them up and secure them, and also their nets and other apparatus for the fishery, so that they may not be used after the 12th October till the 7th January. The 37 Geo. 3. (3) amended 4 Ann. c. 21. for preserving salmon and other fish in the rivers of Hampshire and Wiltshire, and 1 Geo. 1. c. 18. for preserving the fry of fish, &c. The time wherein salmon may not be taken is fixed to commence on the 12th Sept. and to continue till 1st Jan. instead of 1st August to 11th Nov. as formerly; and the millers are now directed to leave an opening of a foot square in the streams, without any intermission from 11th Nov. to 11th July. The salmon fishery in the Teign, Nith, and Dart rivers, is protected by 43 Geo. 3. (4)

Of the Mackarel Fishery.

By the statute 35 Geo. 3. c. 54. (5) which continued in force till 1st June 1797, it was provided that fish curers in Great Britain may import any quantity of foreign salt, or take any quantity of British salt from any salt works and salt pits, and remove coastwise the salt so imported or taken for the purpose of curing mackarel (or any cod, ling, hake, or salmon, taken in the mackarel fishery) for home consumption, duty-free, except the customs due on the importation thereof, in as full a manner as any curers of fish engaged in the herring and pilchard fishery are enabled to do for home consumption; and for every barrel

(1) 3 vol. 722.

(2) 4 Macph. Ann. Comm. 418. 37 Geo. 3. c. 48. amended by 47 Geo. 3. st. 1. c. 39.

(3) 4 Macph. Ann. Comm. 421. 37 Geo. 3. c. 95.

(4) 43 Geo. 3. c. 61. altering 13 Edw. 1. c. 47. 13 Ric. 2. c. 19.

(5) Montefiore Dict. tit. Fishery. 4 Macph. Ann. Comm. 343. 35 Geo. 3. c. 54. and see 36 Geo. 3. c. 77.

of white mackarel twice packed and completely cured, containing 32 gallons, which should be exported from Great Britain into any parts beyond seas (except into any part of the Mediterranean, in which case no bounty given by this act shall be paid), a bounty of 2s. 6d. should be paid; and for every barrel of mackarel which should be landed from any boats or vessels, and which should thereafter be properly salted and cured, there should be paid a bounty of 1 s.; and it was provided that any person might carry from any port or place in Great Britain to any other place or port in the said kingdom, any mackarel, or any cod, ling, hake, or salmon being taken in the mackarel fishery, and cured for home consumption. The proper officers appointed to pay the bounties given by this act, were directed to retain in their hands the following sums to defray the charges attending the passing of this act, until the same should amount to £200; viz. for every barrel of mackarel on which the bounty of 1 s. should be payable, the sum of 6 d., and for every barrel of mackarel on which the bounty of 2 s. 8 d. should be payable, the sum of 1 s. 6 d.' The 36 Geo. 3. (1) directed these bounties to be paid by the officers appointed to pay bounties under 5 Geo. 1. and 26 Geo. 3.

The Turbot and Lobster Fisheries.

The size of lobsters for sale is fixed by 10 & 11 W. 3. (2) to eight inches from the tip of the nose to the end of the middle fin of the tail, subject to a forfeiture of 1 s. per lobster; and the 1 Geo. 1. (3) enforced by 9 Geo. 2. c. 33. and 26 Geo. 3. c. 81. s. 43, 44. declares it lawful for foreigners as well as British freely to import, in any vessel whatever, any quantity of British or foreign-caught turbots or lobsters. The fishing is said to be carried on by the Dutch, who receive a large sum in specie annually from our fishermen for catching lobsters for them (4). The preservation of the spawn of lobsters, by prohibiting the taking them between the 1st June and 1st September, "during which time," the act recites "that they crawl close to the shore to leave the spawn in the chinks of the rocks, and as much under the influence of the sun as possible," was provided for by 9 Geo. 2. (5) which gives a £5 penalty for taking lobsters on the coast of Scotland within that period. By the 29 Geo. 2. (6)

(1) 36 Geo. 3. c. 77. 5 Geo. 1. c. 18. 26 Geo. 3. c. 81.

(2) 10 & 11 W. 3. c. 24. s. 12.

(3) 1 Geo. 1. st. 2. c. 18. s. 10. Pope, tit. cvli. rule 6. Reeves, 2d ed. 506.

(4) See ante, 297. a person by buying turbots at sea to sell again, is a trader within bankrupt laws. Hearne v. Birch. 3 Camp. 233.

(5) 9 Geo. 2. c. 33. sect. 4.

(6) 29 Geo. 2. c. 39. s. 1. 22 Geo. 2. c. 49. and see 33 Geo. 2. c. 27.

the eight days allowed by the 22 Geo. 2. for the sale of fish, is extended to 12 days for the sale of lobsters. The 2 Geo. 3. (1) enacts that no contract for the purchase of any salmon or lobsters caught in any sea or river of Great Britain, shall be in force for more than one year. It has been decided (2) that the 50 Geo. 3. which exempts certain persons who shall be employed in the *fisheries of these kingdoms* from being impressed, extends to a lobster fishery carried on by British subjects upon the coast of Heligoland, for the purpose of supplying the London market with that fish, and the court discharged a mariner and an apprentice who had been impressed out of one of the vessels engaged in that fishery.

Of the Oyster Fisheries.

As foreign oysters are not prohibited from being imported into Great Britain, but on the contrary are excepted in the general acts which prohibit the importation of foreign-caught fish, they may be legally imported; and it is observed, that as there is a duty on them in the consolidation act, of nine-pence per bushel, which is not leviable on British-caught fish, this must be construed as a permission to import foreign-caught oysters (3). With respect to the oysters caught on the coasts and rivers of Great Britain, they are protected by several statutes. The 3 Jac. 1. c. 12. prohibits persons from "willingly taking, destroying, or spoiling any spawn, fry, or brood of any sea fish in any wear or other engine whatsoever;" but this act only means, a taking for destruction, and not a taking of oyster spawn for the purpose of removing it to beds for further growth and maturity, to make it marketable. (4)

By 31 G. 3. c. 51. (5) any person who shall use any net, trail, dredge, or other instruments within the limits of any oyster fishery, or shall dredge for oysters or oyster brood, or use any oyster dredge, or any net, instrument, or engine whatsoever, within the limits of any oyster fishery, for the purpose of taking or catching oysters or oyster brood, although no oysters or oyster brood shall be actually taken, or shall with any net, instrument,

(1) 2 Geo. 3. c. 15. s. 14.

(2) Payne and Thoroughgood's case, 1 M. & S. 223. where see the mode of carrying on the lobster fishery. 50 Geo. 3. c. 108. s. 2. 2 Geo. 3. c. 15.

(3) Reeves, 2d ed. 506. Pope, tit. 246. table A. Imports, tit. Oysters.

(4) Bridger, qui tam v. Richardson, 2 M. & S. 568.

(5) 31 Geo. 3. c. 51. Montefiore Dict. tit. Fishery.

or engine drag upon the ground or soil of any such fishery, such person not being lawfully entitled to take or catch oysters therein, shall be deemed guilty of a misdemeanor, and may be prosecuted for the same by indictment at the assises or general quarter sessions for the county in which such fishery shall lie; and such person, being lawfully convicted by verdict or confession, may be punished for either of the said offences either by fine and imprisonment, as the court shall think proper; such fine not to exceed £20 nor be less than 40s., and such imprisonment not to be for more than three months nor less than one month. But the act provides that this enactment shall not extend to the taking of floating fish in any way within the oyster fisheries. After this act it was held, that the taking of oysters from an oyster bed in an arm of the sea was not a felony, and could only be prosecuted as a misdemeanor (1); and therefore this act being found inadequate to secure the brood of oysters from depredation, the 48 G. 3. c. 144. declares that the offender shall be deemed guilty of felony, and may be transported for seven years, or may be imprisoned and kept to hard labour for any term not exceeding three years. (2)

The right of a company of oyster fishermen to make bye-laws, to bind their body, was discussed in a late case (3); and it was decided that a bye-law made by the freemen of a company of oyster fishermen, prohibiting any freeman from being engaged in the trade of sending oysters to market from any other ground on the Kentish shore than the oyster ground of the company, under a penalty of £10, and in case of refusal to pay the same, that such freeman shall thenceforth, and until the fine be paid, be excluded from all share of the profits to be made thereafter by the joint trade of the company, is a void bye-law, there being no usage stated to that extent, but only an usage for the freemen to make orders for regulating the company and fishery, with fines and penalties for the breach of such orders, and for prohibiting the freemen from being engaged in other oyster grounds, under penalties, to be stopped out of the money arising by the sale of the stint of oysters of such freemen.

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(1) Rex v. Walford, 5 Esp. Rep. 62.

(2) See statutes and forms of indictments, 3 Chitty Crim. Law, 930. 973. 975.

(3) Adley v. Reeves, 2 M. & S. 53.

6thly, Of Fisheries in Ports, Harbours, and Navigable Rivers. (1)

It seems clear that all subjects in general have the same right to fish in ports, navigable rivers, and arms of the sea, as they have to fish in the sea itself (2): an arm of the sea, where the tide flows and re-flows, was considered in the civil law as the same for this purpose as the sea itself (3). And though a particular subject may establish an exclusive right to fish in those waters by grant from the crown antecedent to the reign of Richard the 1st, (A. D. 1189), or by prescription, which supposes such grant (4), no such grant since that period is valid; for the second and third charters of Henry 3 (5) provide that all rivers fenced in from the beginning of the reign of Richard the first should be laid open, so that a franchise of this nature ought to be at least as old as the reign of Henry the 2d (6). But if the right to such exclusive privilege existed by grant from the crown before the time of legal memory, the king may continue and re-grant it; and therefore in the case of Abbotsbury (7) king Henry the 8th granted "all that free fishery called the fleet in Abbotsbury, which is a bay or creek of the sea, in the same manner as the abbot had the fishery there before the dissolution of monasteries;" and such grant was sustained, because it must be intended that the abbot had it originally by grant from the crown, being a right of several fishery in an arm of the sea, and by consequence thereof a royal fishery. It also appears from Hale's Treatise, published in Hargrave's Law Tracts, that the king has a right and propriety to the shore and maritima incrementa (8). The shore is that ground between the ordinary high and low water mark: this doth primâ facie and in common right belong to the king, both in the shore of the sea and the shore of the arms of the sea. Such exclusive right may be vested in a subject by grant from the crown, and may not only belong to a subject in gross, which possibly may suppose a grant

(1) See division of the subject, ante, 267.

(2) Bracton, lib. 2. cap. 12. 1 Mod. 105. Anon. Davys, 55, 6. 6 Mod. 73. Warren v. Matthews, 1 Salk. 357. 2 Burr. 2163, 4, 5. Carter v. Nuncott and another, Plowd. 315. 2 Salk. 637. Com. Dig. Pischary A. Prerogative D. 50. Schultes on Aquatic Rights, 68.

(3) Justin. Instit. lib. 1. c. 1. tit. 1.

(4) Mayor of Oxford v. Richardson, 4 Term R. 437. 2 Hen. Bla. 182. 2 Bos. & Pul. 472. 4 Burr. 2162. Schultes on Aquatic Rights, 68, &c. and see other cases, 1 Chitty on Game Law, 267 to 273.

(5) 9 Hen. 3. c. 6. and c. 20.

(6) 2 Bla. C. 39. Schultes on Aquatic Rights, 76.

(7) Cited in Davys Rep. 57.

(8) Hargrave's Tracts, 12. 5 Rep. 107. Dyer, 32 b.

before time of memory, but may be parcel of a manor (1); but it must be prescribed for and proved against the common right which is presumed to exist.

However, if an individual has a right of fishery in a navigable river it is subject to the right of the public to use the river for all the purposes of navigation; and in an action (2) for disturbance of plaintiff's fishery in the river Tweed, Wood, B. said a navigable river is a public highway, and all persons have a right to come there in ships, and to unload, moor, and stay there as long as they please; nevertheless, if they abuse that right, so as to work a private injury, they are liable to an action. The question will therefore be, whether the defendant has abused his right. The privilege of the plaintiff must be subservient to the right of the public. It would be of very mischievous consequences if the owner of a fishery could prescribe to the public how and where they are to moor in a navigable river. The only case I remember like this, was where a man obstinately refused to move his ship from opposite a wharf, although it would have been just the same if he had moved a little one way or the other; and therefore he abused his right, and the plaintiff recovered. The defendant had a right to moor and remain where his ship lay as long as convenience required; if he acted wantonly and maliciously, for the purpose of injuring the fishery, the plaintiff is entitled to a verdict, and not otherwise.

Having thus shewn that the original property in the fisheries of an arm of the sea or navigable river, and of the shores thereof, is prima facie in the king, and that an exclusive right to the fishery of an arm of the sea or navigable river may have been by him conferred on, and may be prescribed for by the subject, it now remains to be shewn how it is to be claimed and how proved. In Warren v. Matthews (3), sola piscaria in the river Ex, by a grant from the crown, was claimed; and Holt, C. J. said the subject has a right to fish in all navigable rivers, as he has to fish in the sea, and a quo warranto ought to be brought to try the title of this grantee, and the validity of his grant. Trespass lies for fishing in an arm of the sea or navigable river, if a grant be de libera piscariâ; for the grantee shall have the property

(1) Harg. Tracts, 267. 5 Rep. 107. Dyer, 326 b. Com. Dig. tit. Navigation A. Willes, 475. 4 Term. Rep. 439.

(2) 1 Campb. 517 notis.

(3) 1 Salk. 357. 6 Mod. 73.

of the fish there (1). The grantee of such an exclusive right must use it under the terms of the grant, and shall not be allowed to exceed it; thus in a case where (2) a right was proved by ancient deeds for the owner of an estate to have a weir across a river for taking fish, and it appeared that such weir was heretofore made of *brushwood*, he cannot convert it into a *stone* weir; and Lord Ellenborough said, that the erection of weirs across rivers was reprobated in the earliest periods of our law. The words of Magna Charta (3) are, "that all weirs from henceforth shall be utterly pulled down by Thames and Medway, and through all England," &c.; and this was followed up by subsequent acts (4) treating them as public nuisances, forbidding the erection of new ones, and the enhancing, straitening, or enlarging of those which had aforetime existed. Now here it appears, that previous to the erection of this complete stone weir, there had been always an escape of the fish through and over the old brushwood weir, in which those in the stream above had a right, and it was not competent for the defendant to debar them of it by making an impervious wall of stone, through which the fish could not insinuate themselves, as it is well known they will through a brushwood weir, and over which it is in evidence that the fish could not pass, except in extraordinary times of flood; and however 20 years acquiescence may bind parties whose private rights only are affected, yet the public have an interest in the suppression of public nuisances, though of longer standing; no objection however of this sort can apply to the present case, where the action was commenced within 20 years after the complete extension of the stone weir across the river, by which it is proved that the plaintiff has been injured. Then, however general the words of the ancient deeds may be, they are to be construed, as Lord Coke says, by evidence of the manner in which the thing has been always possessed and used; and Lawrence, J. added, that there is no bar to the action from any length of possession in the defendant. In a subsequent action of trespass for breaking and entering a several oyster fishery in B. river (5), it was decided, that in order to prove a prescriptive right of fishery as appurtenant to a manor, old licences on the court rolls granted by the lords of the manor, in consideration of

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(1) Com. Dig. Pischary, A. 4 Mod. 186, 7. Skinn. 342. 2 Salk. 637.

(2) Weld v. Homby, 7 East, 195. 3 Smith, 244. S. C.

(3) Cap. 23.

(4) 12 Edw. 4. c. 7.

(5) Rogers v. Allen, 1 Campb. 309.

certain rents, to fish in the locus in quo, are evidence without proof of the rents being paid, if it appears that such rents have been paid in modern times, or that the lords of the manor have exercised other acts of ownership over the fishery; and it also appears from that case, that where the evidence for the plaintiff was for all sorts of fishing, and the defendant proved his having fished in the locus in quo for floating fish without interruption, yet that that abandonment of a part of a fishery did not preclude the owner from preserving another part of more value; the public might be entitled to catch floating fish in B. river, but it by no means followed, that they are justified in dredging for oysters, which may still remain private property; but the prescription must not be larger than the proof, though the prescription will not fail if the evidence be more extensive.

CHAP. VIII.

How the Commerce and Contracts of Belligerents are legally affected by War.

THE two preceding chapters upon the navigation laws and fisheries, concluded so much of our subject as relates to the modes by which the commerce of one country may be affected by the acts of another during *peace*: we are now arrived at the next division, in which we are to examine how far the commerce of one state may be affected by acts of another during *war*. This part of the subject subdivides itself into *three* branches, involving, *first*, the state of the commercial law, as between *belligerents and belligerents*; *secondly*, as between belligerents and *neutrals*; and *thirdly*, the *dispensations* or exceptions, by licences, orders in council, &c. These are subjects of great importance in a commercial point of view, because, if the traffic be illegal, any contract or policy of insurance relating to it cannot be enforced, and the property is liable to be taken and confiscated; and it is also an indictable offence at common law to be concerned in such unlawful trafic (1).

I. In considering the state of the commercial law of nations, and of the United Kingdom in particular, as it affects *belligerents*, we will trace, 1*st*, the authorities by which the intercourse of enemies is in general prohibited, and then examine the few excepted cases where it is allowed; 2*dly*, we will consider the legal definition of war, and who are to be deemed alien enemies, and what constitutes an hostile character, for commercial purposes; and 3*dly*, the detention, seizure, capture, and condemnation, by one belligerent, of the property of another belligerent employed in commerce.

Section I. How far Commercial Intercourse between Belligerents and

1st. It is the established law of nations, that when war has taken place between two or more states, all commercial intercourse between the subjects of each must immediately cease,

(1) The King v. Cowper, Skinner, 637.

their Allies is prohibited, and the Exceptions to that Rule.

unless it be otherwise expressly stipulated by treaty. Hostilities having commenced, any attempt to trade on the part of the subjects of either state, unless by the permission of the sovereign, is interdicted by the general law of Europe; a law which does not spring from the institutions of this or that particular state, but which, having its source in natural reason and natural justice, is alike binding on the whole community of the civilized world (1). This rule is founded on the principle that war puts every individual of the respective belligerent governments into a state of mutual hostility, and there is no such thing as a war for arms and a peace for commerce. In that state, all treaties, civil contracts, and rights of property, are put an end to or suspended, and the law imposes a duty on every subject to attack the enemy and seize his property, though by custom this is restrained to those individuals only who have commissions from their government for that purpose. Trading, which supposes the existence of civil contracts and relations, and a reference to courts of justice, is necessarily contradictory to a state of war; besides, it is criminal in a subject to aid and assist the enemy, and trading affords that aid in the most effectual manner, by enabling the merchants of the enemy's country to support their government. Export duties are to be paid when goods are brought from an enemy's country, which is furnishing the very sinews of war to the hostile government; and such trading would also facilitate the means of conveying intelligence and carrying on a traiterous correspondence with the enemy, which would more than counterbalance any advantage likely to accrue to individuals from such trading. These considerations apply with peculiar force to maritime states, where the principal object is to destroy the marine and commerce of the enemy, in order to force them to peace (2).

It was observed by Sir Wm. Scott, in the cause of the Hoop (3), "that by the law and constitution of this country, the sovereign alone has the power of declaring war and peace. He alone, therefore, who has the power of entirely removing the state of war, has the power of removing it in part, by

(1) The Hoop, 1 Rob. Rep. 198. Potts v. Bell, 8. T. R. 548. Mennett v. Bonham, 15 East, 489. Willison v. Patteson, 7 Taunt, 439. Grotius, lib. 3. c. 4. s. 8. Bynkershoek, lib. 1. c. 3. Vattel, lib. 3. c. 4. Dr. Phillimore on Licences, 5.

(2) Potts v. Bell, 8 Term Rep. 548. Mennett v. Bonham, 15 East, 493, 4.

(3) 1 Rob. Rep. 196.

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permitting, where he sees proper, that commercial intercourse, which is a partial suspension of the war. There may be occasions, where such an intercourse may be highly expedient. But it is not for individuals to determine on the expediency of such occasions on their own notions of commerce, and possibly on grounds of private advantage, not very reconcileable with the general interests of the state. It is for the state alone, on more enlarged views of policy, and on consideration of all the circumstances that may be connected with such an intercourse, to determine when it shall be permitted, and under what regulations. In my opinion, no principle ought to be held more sacred, than that this intercourse cannot subsist on any other footing, than that of the direct permission of the state. Who can be insensible to the consequences that might follow, if every person in a time of war had a right to carry on a commercial intercourse with the enemy, and under colour of that, had the means of carrying on any other species of intercourse he might think fit? The inconvenience to the public might be extreme: and where is the inconvenience on the other side, that the merchant should be compelled, in such a situation of the two countries, to carry on his trade between them, if necessary, under the eye and control of the government charged with the care of the public safety (2)?" And after enumerating all the cases which tended to establish this rule, Sir Wm. Scott observed, "The cases which I have produced prove, that the rule has been rigidly enforced, where acts of parliament have, on different occasions, been made to relax the navigation law, and other revenue acts; where the government has authorized, under the sanction of an act of parliament, a homeward trade from the enemy's possessions, but has not specifically protected an outward trade to the same, though intimately connected with that homeward trade, and almost necessary to its existence; that it has been enforced, where strong claim, not merely of convenience, but almost of necessity, excused it on behalf of the individuals; that it has been enforced, where cargoes have been laden before the war, but where the parties have not used all possible diligence to countermand the voyage after the first notice of hostilities; that it has been enforced, not only against the subjects of the crown, but likewise against those of its allies in the war, upon the supposition that the rule was founded on a strong and universal principle, which allied states in war had a right to

(1) Per Sir Wm. Scott, in the Hoop, 1 Rob. Rep. 199.

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notice, and apply mutually to the subjects of each other." So if a British subject effect an insurance on alien's property, the subsequent declaration of hostilities determines the contract, and the underwriter is not liable for a subsequent loss. (1)

The principal cases, which establish the illegality of commerce between belligerents, are the Hoop (2), and Potts v. Bell and others (3). In the first case, Mr. Malcolm of Glasgow, and other Scotch merchants, had traded to Holland for articles necessary for the agriculture and manufactures of that part of the country, for which they had several times before applied for and obtained the king's licence; but after the passing of certain acts of parliament, having, upon application to the commissioners of the customs at Glasgow, been informed (erroneously as it afterwards appeared) that such licences were no longer necessary, they had omitted to obtain one on that occasion; in consequence of which, the cargo being taken was condemned as prize, on the general ground that all trading with an enemy, without the king's licence, was illegal and a cause of confiscation. And in the case of Potts v. Bell (4), a British subject shipped from the enemy's country, on board a neutral ship, goods which he had purchased of the enemy during hostilities, and it was decided, that an insurance upon such cargo was illegal and void. These cases shew, that there is no distinction between trading with an enemy and with an enemy's country; and that aid is considered as being equally given to the enemy, whether goods be furnished immediately by the enemy, or through the medium of a neutral merchant, and that the danger of a traitorous correspondence is the same. This strict exclusion of trade between belligerents has been carried so far as to prohibit a remittance of supplies even to a British colony, during its temporary subjection to an enemy. This extreme point is established by the case of the Bella Guidita (5). In that case Grenada, a British possession, had been seized by the French, but by the public acts, both of France and of this country, it appeared that the island was not considered to have entirely changed its national character; the French having made ordinances with respect to it which they would not have made in the case of an island strictly French, and the British legislature having even enacted, in the 20th year

(1) Brandon v. Curling, 4 East, 410. Antoine v. Morshead, 6 Taunt. 239.

(2) 1 Rob. Rep. 196.

(3) 8 Term Rep. 548.

(4) 8 T. R. 548.

(5) 1 Rob. Rep 207.

of his present Majesty, that it being just and expedient to give every relief to the proprietors of estates there, no goods of the produce of Grenada, on board neutral vessels going to neutral ports, should be liable to condemnation as prize. Notwithstanding all these evidences, that the character of Grenada was not to be considered strictly hostile, notwithstanding even the express permission to export the produce of that island, a neutral vessel sent from England with goods to be imported into Grenada was seized, as employing itself in an illicit intercourse with the enemy, and condemned in the vice-admiralty court of Barbadoes; upon appeal to the privy council by the proprietors of the cargo, the sentence was affirmed(1); and though it was in one case

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(1) The hardship of this rule, as applied to this individual case, was strongly represented in the printed papers of appeal, as will be seen by the following extract from 1 Rob. Rep. 219. "In the late unfortunate war, say the appellants, Great Britain saw many of its valuable West India possessions fall into the hands of the enemy, from the absolute inability to protect them: the proprietors being still British in principle and affection, and many of them by actual residence; and the hope being constantly entertained, as well by the public as by individuals, that those islands would soon revert to the dominion of their natural sovereign, the parliament, in the several cases of Nevis, Montserrat, St. Christopher's, Grenada, and the Grenadines, expressly permitted the produce of those plantations to be conveyed to Europe free from British capture, under limitations intended merely to prevent the abuse of this permission, by the clandestine extension of it to the produce of foreign colonies. In this provision the principle appears to be clearly recognised and established, that these islands, though captured, were not to be considered as French, for upon what other principle could British protection have been imparted to them? And if the British legislature did thus solemnly declare its intention to protect and encourage the produce of those plantations during the remainder of the war, upon what grounds of legal or political analogy, can it be contended, that it was criminal to transmit those supplies, without which those plantations could not possibly be continued in a state of culture? Does not the expressed permission of exportation involve a permission of all that species of necessary importation without which the pretended permission of the other is merely nugatory and insulting? It remains for your Lordships to decide, whether those could possibly be the intentions of the British government, viz. That those islands should be condemned to absolute sterility by a refusal of such necessary supplies, as the French, from a partiality for their own islands, found it convenient to withhold from them; that the only practicable mode for the immediate collection of British debts, secured upon those plantations to an enormous amount, should be prohibited and punished; and that Great Britain, instead of receiving many important articles of consumption and commerce from its ancient markets, which it still continued to consider as its own, should lie at the mercy of the ancient markets of the enemy, upon such terms, as a successful monopoly would prescribe."

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holden that an alien, to whom a bill of exchange drawn on England by a British subject detained prisoner in France during war, payable to another British subject also detained there, and which bill was there indorsed by the latter to the plaintiff, may sue on it in this country after the return of peace (1), yet that decision turned upon the circumstance of the bill having been framed between two British subjects prisoners at war in a foreign country, and who could not otherwise subsist. In a subsequent case, upon a review of most of the authorities, it was held, that no contract made with an alien enemy in time of war, can be enforced in a court of English judicature, although the plaintiff do not sue until the return of peace; and therefore where the defendant, a British subject resident here, having in his hands the proceeds of certain goods of A., an alien enemy, A. drew on the defendant payable to his own order, and indorsed the bill to the plaintiff, an English-born subject resident in the hostile country, who sued on the bill after peace restored, it was held that he could not recover. (2)

Cartel Ships.

One of the most reasonable instances in which this rule has been enforced, appears to be in the case of *ships of truce*, or *cartel ships*. As observed by Sir William Scott, in the case of the Venus (3), "The conduct of ships of this description cannot be too narrowly watched. The service on which they are sent is so highly important to the interests of humanity, that it is peculiarly incumbent on all parties to take care that it should be conducted in such a manner as not to become a subject of jealousy and distrust between the two nations." The Venus was a British vessel, which had gone to Marseilles, under cartel, for the exchange of prisoners. She had there taken a cargo on board, and was stranded and captured on a voyage to Port Mahon. Sir William Scott condemned her, on a full view of the circumstances of the case, adding these further remarks, which are applicable to all other cases of cartel ships trading with the enemy: "It is not a question of gain, but one on which depends the recovery of the liberty of individuals, who may happen to have become prisoners of war; it is therefore a species of navigation which, on every consideration of humanity and policy, must be conducted with the most exact attention to the

(1) Antoine v. Morshead, 6 Taunt. 237.

(2) Willison v Patteson and others, 7 Taunt 439.

(3) 4 Rob. Rep. 357.

original purpose, and to the rules which have been built upon it; since, if such a mode of intercourse is broken off, it cannot but be followed by consequences extremely calamitous to individuals of both countries. Cartel ships are subject to a double obligation to both countries not to trade. To engage in trade may be disadvantageous to the enemy, or to their own country; both are mutually engaged to permit no trade to be carried on under a fraudulent use of this intercourse; all trade must therefore be held to be prohibited; and it is not without the consent of both governments, that vessels engaged in that service can be permitted to take in any goods whatever."

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This rule, which renders it illegal for a British subject to carry on commerce with an enemy, also precludes an *ally* from a similar intercourse (1). In the case of the Nayade (2), Sir William Scott said, "that the case of the Enigheid was decided on the ground that, during a conjoint war, no subject of one belligerent can trade with the enemy, without being liable to a forfeiture of his property engaged in such trade, in the courts of the ally." The principle of this rule is stated by Sir William Scott, in the case of the Neptunus (3), who said, "It is well known that a declaration of hostility naturally carries with it an interdiction of all commercial intercourse; it leaves the belligerent countries in a state that is inconsistent with the relations of commerce. This is the natural result of a state of war, and it is by no means necessary that there should be a special interdiction of commerce to produce this effect. At the same time it has happened, since the world has grown more commercial, that a practice has crept in, of admitting particular relaxations, and if one state only is at war, no injury is committed to any other state. It is of no importance to other nations how much a single belligerent chooses to weaken and dilute his own rights; but it is otherwise when allied nations are pursuing a common cause against a common enemy. Between them it must be taken as an implied, if not an express, contract, that one state shall not do any thing to defeat the general object. If one state admits its subjects to carry on an uninterrupted trade with the enemy, the consequence may be, that it will supply that aid and comfort to the enemy, especially if it is an enemy depending

Illegal for an Ally to carry on Commerce with Enemy.

(1) But a neutral or a British subject, resident in a neutral state, is not precluded from carrying on trade with an enemy. Bell v. Reid, 1 M. & S. 727.

(2) 4 Rob. Rep. 251.

(3) 6 Rob. Rep. 405.

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very materially on the resources of foreign commerce, which may be very injurious to the prosecution of the common cause, and the interests of its ally. It should seem, that it is not enough therefore to say, that the one state has allowed this practice to its own subjects, it should appear to be at least desirable that it could be shewn, that either the practice is of such a nature as can in no manner interfere with the common operations, or that it has the allowance of the confederate state."

Attempts to elude the Rule unavailable.

The advantages which particular individuals might derive from the violation of this rule, have caused a number of attempts to elude it, but no artifice has yet succeeded in discovering any legal mode of trade between belligerents, without the express permission of their governments. In the case of the Jonge Pieter (1), an attempt was made to protect a cargo shipped in England, and ultimately destined for an enemy's market, by dividing the voyage, and directing the cargo to be taken, in the first instance, to a neutral port, from whence it might or might not be afterwards carried forward to the place of its real destination, the enemy's market. But Sir William Scott condemned it to the captors, making use of the following expressions (2): "Without the licence of government, no communication, direct or indirect, can be carried on with the enemy. On the policy of that law, this is not the place to observe; it is the law of England; and if any consideration of mercantile policy interfere with it, the duty of the subject is to submit his case to that authority of the country which can legalize such a trade, looking to all the considerations of political as well as commercial expediency that are connected with it. But an individual cannot do this; he is not to say, such a trade is convenient, and therefore legal; neither can the court exercise such a discretion. Where no rule of law exists, a sense or feeling of general expediency, which is, in other words, common sense, may fairly be applied; but where a rule of law interferes, these are considerations to which the court is not at liberty to advert. In all the cases that have occurred on this question, and they are many, it has been held indubitably clear, that a subject cannot trade with the enemy without the special licence of government. The interposition of a prior port makes no difference; all trade with the enemy is illegal; and the circumstance, that the goods are to go

(1) 4 Rob. Rep. 79.

(2) 4 Rob. 83, 4. See to the same effect, 3 Rob. 21.

first to a neutral port, will not make it lawful. The trade is still liable to the same abuse, and to the same political danger, whatever that may be."

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Nor have the endeavours which have been made to protect the cargo, by the intervention of *third persons*, been more successful than the interposition of a fictitious destination. Thus, in the case of the Samuel (1) it was decided, that if an English subject employs a neutral to purchase for him in the country of the enemy, the neutral is in such case but the mere agent, the goods must then be considered to pass immediately from the enemy to the British subject, and such a transaction would be illegal. But if a neutral merchant has, bona fide, goods or vessels of his own, lying in an enemy's port, the Court admitted that he might dispose of them, even to a British subject, as freely as if they were on the seas, and the locality of the ship will not affect the legality of the sale. However, we shall hereafter see, that merchants, taking up their residence in an enemy's country, are not to be considered neutrals at all, so that there is little possibility of collusion by this resource. A *partnership* has also been tried as a cloak for this illegal intercourse, but with the same unvarying ill success which has attended all other stratagems. For, in the case of the Franklin (2), which was a case of trade carried on with the enemy by a firm, consisting partly of neutrals and partly of British subjects, Sir William Scott said, "It has been decided, that even an inactive, or sleeping partner, as it is termed, cannot receive restitution in a transaction in which he could not lawfully be engaged as a sole trader."

Decisions at Law on the Rule.

There was formerly some doubt, whether the rule, which we have seen has been thus rigidly enforced in the admiralty courts, was to prevail to the same extent in the courts of common law. The cases of Gist and Mason (3), and Bell and Gilson (4), had left the question in much perplexity, but the uniformity of decision between both tribunals was definitively established by Lord Kenyon, in the case of Potts against Bell, in error (5). His Lordship said, "that the reasons urged, and the authorities cited, were so many, so uniform, and so conclusive, to shew that a British subject trading with an enemy was illegal, that the

(1) 4 Rob. Rep. 284. Vide Potts v. Bell, 8 Term Rep. 548.
(2) 6 Rob. Rep. 131.
(3) 1 Term Rep. 84.
(4) 1 Bos. & Pul. 345.
(5) 8 Term Rep. 548.

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question might be considered finally at rest, and that it was needless to delay giving judgment for the sake of pronouncing the opinion of the Court in more formal terms; more especially, as they could do but little more than recapitulate the judgment, with the long train of authorities already to be found in the clearest terms in the printed report of the case of the Hoop, published by Dr. Robinson." Nor does it make any difference in the illegality of the trade, that it be carried on by land rather than by water. There is an authority (1) shewing, that it was anciently deemed illegal to trade with Scotland, then in a general state of enmity with this kingdom: and in the case of the Hoop, Sir William Scott, referring to this note in Rolle declares, "that the rule in no degree arises from the transaction being upon the water, but from principles of public policy, and of public law, which are just as weighty on the one element as on the other, and of which the cases have happened more frequently upon the water, merely in consequence of the insular situation of this country; but when an enemy existed in the other part of the island, the only instance in which it could occur upon the land, it appears to have been deemed equally criminal in the jurisprudence of this country."—In the case of Gist v. Mason (2), Lord Mansfield mentioned an instance, where trading with an enemy was deemed unlawful, from a note given him by Lord Hardwicke, on a reference to all the Judges, in the time of King William the Third, whether it were a crime at common law to carry corn to an enemy, who were of opinion that it was a misdemeanor.

Exceptions to the Rule.

But though the rule is thus general and impartial, it is not extended beyond its just and strict construction. The case of the packet De Bilboa (3), was a claim made by an English house for goods shipped on board a Spanish vessel, by order of Spanish merchants, before hostilities with Spain. Hostilities had been declared subsequently to the shipment, and the vessel, on its voyage from London to Corunna, had been seized by a British captor. Sir William Scott observed, "that the English merchant, who shipped the goods in London, was not called upon to know that the injustice of the other party would produce a war before the delivery of his goods; that the goods were to have been at the risk of the shippers till delivery; and that the

(1) Rol. Ab. 173.
(2) 1 Term Rep. 84. See also Skinner, 638.
(3) 2 Rob. Rep. 133.

contract was perfectly fair. He therefore decreed restitution to the shipper." The case of the Abby (1) also shews, that the court of admiralty has not been disposed to force the rule beyond its true spirit. A ship sailed on the 11th September 1795, for the island of Demerara, then a Dutch colony. War being declared on the 16th of the same month against Holland, Demerara became of course a hostile possession. The ship was captured off its coast in May 1796, but the island having in the mean time surrendered to the British forces, had become a British colony. Sir William Scott held, that as the port to which the ship was destined did, at the time of her carrying the design into effect, belong, not to an enemy, but to his Britannic Majesty, the ship was not to be deemed in fact an illegal trader. " I conceive," said he, " that there must be an act of trading to the enemy's country, as well as the intention; there must be, if I may so speak, a legal as well as a moral illegality. (2) If a man fires a gun at sea, intending to kill an Englishman, which would be legal murder, and by accident does not kill an Englishman, but an enemy, the moral guilt is the same, but the legal effect is different; the accident has turned up in his favour, the criminal act intended has not been committed, and the man is innocent of the legal offence. So, if the intent was to trade with an enemy, (which I have already observed cannot be ascribed to the party at the commencement of the voyage, when hostilities were not yet declared,) but at the time of carrying the design into effect, the person is become not an enemy; the intention here wants the corpus delicti. No case has been produced in which a mere intention to trade with the enemy's country, contradicted by the fact of its not being an enemy's country, has enured to condemnation. Where a country is known to be hostile, the commencement of a voyage towards that country may be a sufficient act of illegality; but where the voyage is undertaken without that knowledge, the subsequent event of hostility will have no such effect. On principle, I am of opinion, that the party is free from the charge of illegal trading."

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From the same case, and from the case of the Hoop (3), it is further to be collected, that where cargoes have been laden before the war, they will be restored to the claimants, if it be shewn that on the first notice of hostilities all possible diligence

(1) 5 Rob. Rep. 251.

(2) See ante, 244, 5, as to importations.

(3) 1 Rob. Rep. 198.

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was employed to countermand the voyage, or alter its destination, so as to avoid the culpability of an illegal trading with the enemy. But if proper exertions have not been made, and the cargo has been suffered, whether wilfully or negligently, to sail from the enemy's country, no excuse deduced from individual convenience, or from the alleged necessity of withdrawing British property out of a territory which has become hostile, can, of strict right, secure the cargo without a protection from government. (1) It is true that in the case of Bell and Gilson (2), it was held, that if an Englishman, at the commencement of hostilities, had goods in an enemy's country, he might bring them away. But it seems, that the case of Potts and Bell (3) has reversed that, as well as most of the other doctrines laid down in Bell and Gilson. This doctrine is established by a decision quoted in the case of Potts and Bell by the king's advocate. That authority he cited from a MS. note of Sir Edward Simpson, of the case of St. Philip, at the Cockpit, wherein it was established, that trading with an enemy is a subject of confiscation, and excludes any exception, even on the ground that the goods had been purchased before the war. This authority, with all the others cited by the king's advocate in the case of Potts and Bell, received the general sanction of Lord Kenyon in delivering the judgment of the court.

At the same time, in cases of hardship, the courts have not shewn themselves unwilling to make some relaxations. In the case of Dree Gebroeders (4), Sir W. Scott observes, "That pretences of withdrawing funds are at all times to be watched with considerable jealousy; but when the transaction appears to have been conducted bona fide with that view, and to be directed only to the removal of property, which the accidents of war may have lodged in the belligerent country, cases of this description are entitled to be treated with some indulgence." But in the case of the Juffrow Catharina (5), a case where an indulgence was allowed by the court for the withdrawing of British property, Sir W. Scott intimated, that his decree in that instance was not to be understood as in any degree relaxing the general necessity of obtaining a licence, wherever property is to be withdrawn from the country of the enemy. Dr. Robinson (6) has subjoined to

(1) See cases cited in 8 Term Rep. 548.
(2) 1 Bos. and Pul. 345.
(3) 8 Term Rep. 548.
(4) 4 Rob. Rep. 234.
(5) 5 Rob. Rep. 141.
(6) 5 Rob. Rep. 97.

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the report of the case of the Ocean the following useful note: "The situation of British subjects wishing to remove from the country of the enemy on the event of a war, but prevented by the sudden irruption of hostilities from taking measures for removing sufficiently early to enable them to obtain restitution, forms not unfrequently a case of considerable hardship in the Prize Court. In such cases, it would be advisable for persons so situated, on their actual removal, to make application to government for a special pass, rather than to hazard valuable property to the effect of a mere previous intention to remove, dubious as that intention may frequently appear under the circumstances that prevent it from being carried into execution. In the case of the Juffrow Catharina (1), a licence had been granted to import certain raw materials from France, and under this licence an attempt was made to protect a quantity of lace. According to the general principle laid down in the numerous cases that have been considered, there seemed reason to regard this lace as subject to condemnation; but Sir William Scott, in consideration of particular circumstances, was of opinion that it should be restored to the claimant. This decision forms a remarkable exception to the ordinary rules by which licences are construed, and constitutes also an exception to the spirit of that leading principle, by which all commerce with the enemy on private account is so rigidly forbidden, without respect to the hardship of particular cases. "This lace," said Sir William Scott, "was shipped under an order given before hostilities, and it is argued on the part of the captors, that lace is an article which cannot be included under the terms raw materials; that no protection can be derived from the licence, and that the original order ought to have been countermanded at the breaking out of the war. Certainly, if a licence is to be deemed necessary, it will be difficult to say, that the particular licence alluded to in the present case can avail to the protection of this shipment. But there are some considerations, applying to the manner in which this shipment had originated, which may entitle it to more indulgence. It appears that goods were sent out from this country to Flanders, and that an order was given at the same time for a return of certain other foreign articles, and, among the rest, for this lace. It seems, that when an order is given for lace, it is put into a state of preparation, and that more time is required to countermand an order for this article, than

(1) 5 Rob. Rep. 141.

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for others on which less labour and preparation is required. It is a work of long and slow process, in which advances must be made to the manufacturers; and although the demand on that account against the merchant would be suspended during hostilities, it might be difficult to relieve the British merchant from the demand, when the foreign correspondent was rehabilitated and restored to his right of action by the return of peace. It is to be remembered also, that during the present hostilities, there has been a more than ordinary difficulty in carrying on any correspondence with the enemy's countries: a circumstance for which the court has, in other cases, thought it not unreasonable to make some allowance. It does not appear that the party had an opportunity of countermanding; and although it would have been a more satisfactory and a more guarded proceeding on the part of the British merchant, to have applied for a licence for the special importation of this article under the circumstances of his case, there are sufficient considerations to induce the court to think favourably of this claim. There seems to have been no intention to dissemble; it was owing to the erroneous conception of the enemy's shipper that this article was put on board, to take the benefit of a licence that had been procured for other articles in this vessel. It is therefore, in this point of view, distinguishable from Mr. Hankey's case, in which the shipment was made here, where the party had still the dominion over the goods, and the power to stop them from proceeding. Here the dominion was in the enemy's shipper, under a discretion reposed in him by orders before the war, and which the importer is not shewn to have had any opportunity of countermanding. I wish it to be understood, that by this decree the necessity of obtaining a licence is not in any degree relaxed. On the contrary, this court cannot sufficiently inculcate the duty of applying, in all cases, for the protection of a licence, where property is to be withdrawn from the country of the enemy; it is, indeed, the only safe way in which parties can proceed. Without meaning in the least to weaken the force of the obligation, I think the claim, under the particular circumstances of this case, is justly entitled to the favourable considerations which I have thrown out, and I shall direct the property to be restored." An attempt was made by the counsel in the case of De Tastet v. Baring (1) to establish, that no bill drawn from an hostile country upon this, could legally be passed here; but,

(1) 11 East. 268.

upon this point, the court do not appear to have given any opinion. In several recent instances of bills drawn by British prisoners in France upon this country, holders, with full notice of the circumstances, have been permitted to recover, on the ground that otherwise prisoners at war might be deprived of the means of comfortable subsistence. (1)

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In the case of the Madonna Delle Gracie (2), some degree of relaxation was undoubtedly admitted, but it was admitted under very peculiar circumstances, which though certainly infractious of the letter, yet by no means contravened the spirit of the rule. The goods in question, which were wines purchased solely for the supply of the British fleet before hostilities with Spain, were secretly deposited in that country after the breaking out of the war, and then removed to Leghorn, with an addition of some other newly purchased wines mixed in order to colour the previous stock, which had become too pale to be saleable by itself. The mixture of the new wine, which had been purchased subsequently to hostilities, was considered by Sir William Scott so indispensably necessary to the disposal of the old cargo, as not to affect the legality of the transaction. His judgment then proceeds in the following words: " It is said that Mr. Gregory, the claimant in this case, might have obtained a licence; I certainly do not mean to weaken the obligation to obtain licences for every sort of communication with the enemy's country, in all cases where the measure is practicable; but I think I see great difficulties that might have occurred in applying for a licence, or in using it in the present case. How could Mr. Gregory describe his wines, as to the place from whence they would be exported? They were deposited secretly, and could only be exported by particular opportunities. On the other hand, can I entertain a doubt that government would have been very desirous to protect him in the recovery of this property, purchased under a contract with them? Or, on the ground of public utility, is it too much to hold out this encouragement to persons engaged in contracts of this sort, that they shall obtain every facility in disposing of such stores? It would be a considerable discouragement to persons in such situations, at a distance from home, and employed in the public service, if they were to

(1) See Antoine v. Morshead, 6 Taunt. 237. 1 Marsh 558; but in general a bill drawn in war by an alien enemy abroad on a British subject here, cannot be enforced on return of peace. Willison v. Pattesop, 7 Taunt. 439.

(2) 4 Rob. 195.

know, that in case of hostilities intervening, they would be left to get off their stores as well as they could, with a danger of capture on every side. The circumstances of this case may be taken as virtually amounting to a licence, inasmuch as if a licence had been applied for, it must have been granted."

Section II. What is War, and who are to be deemed Alien Enemies, and what constitutes an hostile Character for Commercial Purposes. (1)

Secondly, we are to consider what is the strict definition of war, and who are to be deemed the alien enemies of a belligerent nation, and what constitutes an hostile character for commercial purposes.

Peace and War defined, and how evidenced. (2)

War is that conflict between nations, which cannot be undertaken, or carried on, except by the authority of the sovereign. But the universal law of nations does not acknowledge any general obligation of making a declaration of war to the enemy, previous to the commencement of hostilities. Formerly, such a declaration was considered essential; but since the beginning of the 17th century, it has been the practice for nations to content themselves with publishing a declaration of war through their own dominions, explaining their motives to other powers in writing. In the case of the Nayade (3), Sir Wm. Scott, with reference to the situation in which Portugal stood as to France, during the year 1801, said, "The relation which Portugal has borne towards France at different periods has been extremely ambiguous; at first, there was a wish on the part of Portugal not to consider herself as being at war with France, and if a submissive conduct, and a disposition not to resent injuries, could have afforded protection against the violence of France, she might have escaped; but it is equally notorious, that all these concessions were made without success, and proved utterly inefficacious to prevent Portugal from being implicated in a war with France. In cases of this kind, it is by no means necessary, that both countries should declare war. Whatever might be the prostration and submissive demeanour on one side, if France were unwilling to accept that submission, and persisted in attacking Portugal, it was sufficient; and it cannot be doubted by any body, who has attended to the common state of public affairs, that Portugal was considered as engaged in war with France."

In order, however, to legalize a war, it must not only be commenced or declared by one of the contesting states, but such

(1) See division of the subject, ante, 377.

(2) See Marten's L. N. 271, 2.

(3) 4 Rob. Rep. 252.

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commencement or declaration must be made by that particular branch of the state which is invested by the constitution with this important prerogative. And by the constitution of the United Kingdom, the sole authority to declare war or peace is vested in King (1) "If," says Brooke in his Abridgement (2), "all the people of England would make war with the King of Denmark, and our King will not consent to it, this is not war; but when the peace is broken by ambassadors, the league is determined."

In order to ascertain whether or not a war or state of amity or neutrality subsists, it was observed by Sir William Grant (3), that "it always belongs to the government of the country, to determine in what relation any other country stands towards it; and that is a point upon which courts of justice cannot decide; and the most potent evidence upon such a subject, is the declaration of the state; and if the state recognizes any place as being or as not being in the relation of hostility to this country, that is obligatory in courts of justice (4). A proclamation in the Gazette for reprisals is evidence of an existing war, and it suffices to produce the Gazette on the trial of an action (5); so a recital of the existence of warfare in an act of parliament is evidence of the fact (6). So an order in council, declaring certain ports not hostile which had formerly been so, though such declaration were made for collateral and limited purposes, not covering the trading in question, is conclusive evidence that war no longer subsists, so as to render traffic to such ports illegal (7). And with respect to a war between this country and a foreign state, it has been held that public notoriety is sufficient evidence of the existence of such war, and that evidence of the fact need not be adduced (8); and a declaration of war by a foreign government, transmitted to this country by the English ambassador, and produced from the secretary of state's office, has been admitted as evidence of the commencement of hostilities between

(1) 7 Co. 25 b. Com. Dig. Prerogative, C. 1. As to mode of declaring war or peace, see Beawes Lex Merc. 6 ed. 396, 7. Marten's L. N. 272.

(2) Tit. Denizen, pl. 20.

(3) In case of the Pelican, Burke 1 Edwards, Rep. Append. D. 3 Campb. 62. Blackburn v. Thompson, 15 East, 90. S. P.

(4) Per Ld. Ellenborough, 3 Campb. 66.

(5) Phil. on Ed. 4 ed. 323 and cases there cited. Peake, L. E. 4 ed. 83 to 85. The King v. Sutton, 4 M. & S. 532. Van Omeron v. Dowick, 2 Campb. 44.

(6) The King v. Sutton, 4 M. & S. 532.

(7) Blackburn v. Thompson, 3 Campb. 67. 15 East. 81. S. C.

(8) Phil. on Ed. 4 ed. 323. n. 4. Dolder v. Ld. Huntingfield, 11 Ves. J. 292.

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that government and other states (1); but the notoriety of the existence of a war between two foreign states will not dispense with evidence of the fact. (2)

Alien Enemy defined.

An alien enemy is a person under the allegiance of the state at war with us (3). A distinction has been taken between a permanent and a temporary alien enemy. A man is said to be permanently an alien enemy, when he owes a permanent allegiance to the state at war with us, his hostility being as permanent as his allegiance, beginning at the commencement of his country's quarrel, and concluding only with the termination of the dispute; but he, who does not owe a permanent allegiance to the state at war with us, though he be himself engaged in actual combat against our forces, is not to be deemed a permanent enemy, for his hostility endures no longer than his own individual interest or convenience may continue it. This distinction between permanent and temporary enemies, as applied to the case of a neutral, was taken by Eyre, Ch. J. in the case of Sparenburgh and Bannatyne (4). In that case his Lordship said, "A neutral can be an alien enemy only with respect to what he is doing under a local or temporary allegiance to a power at war with us; when the allegiance determines, the character determines. He can have no fixed character of alien enemy who owes no fixed allegiance to our enemy, and has ceased to be in hostility against us; it being only in respect of his being in a state of actual hostility, that he was even for a time an enemy at all." So though a state may be in the military possession of one of two belligerents, that will not constitute her subjects enemies to the other belligerent, if the sovereign power of the latter chuses to permit a continuance of commerce with them; therefore, where an insurance was effected on property shipped in this country on account of persons who were domiciled at Hamburgh, at a time when that country was in the possession of French troops, the senate continuing to exercise the powers of civil government in the same manner as before, it was held, that the assured were entitled to recover for a loss which happened in the course of a voyage, permitted by His Majesty's orders in council. (5)

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(1) Id. ib. Thelluson v. Costling, 4 Esp. Rep. 266.

(2) Dolder v. Ld. Huntingfield, 11 Ves. J. 292

(3) Per Eyre, Ch. J. in Sparenburgh v. Bannatyne, 1 Bos. and Pul. 163. As to who are aliens, see ante, 108, &c.

(4) 1 Bos. & Pul. 163.

(5) Hagedorn v. Bell, 1 M. & S. 450.

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Of an hostile Character merely as to commercial Purposes.

Besides those persons who are alien enemies strictly so called, as actually bearing arms against one of the belligerent nations, or being liable to be called upon to bear arms against her by the obligation of their allegiance, we have to consider a hostile relation of a much more complicated nature, the relation that exists between a belligerent nation, and that class of persons who, though they be not, during a whole war, nor even at a particular period of it, enemies in the strict sense of the word, absolutely and in all respects, yet must be deemed alien enemies to certain intents and purposes of a commercial nature, so that their property may, for the most part, be taken as prize, according to the laws of war between adverse belligerents. Therefore, when we speak of an *hostile character*, it is to be understood to imply, not hostility to all intents and purposes, but only that degree of hostility which attaches to particular property, and which has been held to authorize the seizure of it.

Hostile Character, by having Possessions or residing in the Territory of the Enemy, or by the Maintenance of a Commercial Establishment there.

The hostile character, thus understood, may be acquired in several ways. "It cannot be doubted," said Sir Wm. Scott in his judgment on the Vrow Anna Catharina (1), "that there are transactions so radically and fundamentally national, as to impress the national character independent of peace or war. The produce of a person's own plantation in the colony of the enemy, though shipped in time of peace, is liable to be considered as the property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of the nation, as a holder of the soil is to be taken as part of that country in that particular transaction, independent of his own personal residence and occupation." So too in the case of the Phœnix (2), Sir Wm. Scott delivered the following principle: "Certainly nothing can be more decided and fixed, as the principle of this court, and of the supreme court, upon every solemn argument there, that the possession of the soil does impress upon the owner the character of the country, as far as the produce of that plantation is concerned in its transportation to any other country, whatever the local residence of the owner may be. This has been so repeatedly decided, both in this and in the superior court, that it is no longer open to discussion. No question can be made on the point of law at this day. First, then, it appears that the produce of the hostile soil is to be considered as bearing a hostile character, and certainly, if any property ought to be

(1) 5 Rob. Rep. 161. (2) 5 Rob. Rep. 21.

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considered as bearing such a character at all, for purposes of seizure, nothing can be more reasonable, than that the tracts of the enemy's land, one of the greatest sources, and as some have supposed the sole source of national wealth, should be regarded as legitimate prize. That the interest of friends may sometimes be involved in our vengeance upon enemies, is a matter which it is natural to regret, but impossible to avoid. The administration of public rules admits of no private exceptions, and he who clings to the profits of a hostile connection must be content to bear its losses also. Secondly, it will be found, that a settlement in a hostile jurisdiction, whether it be by residence, or merely by the maintenance of a commercial establishment, impresses on the person so settling, the character of the enemies among whom he settles, in regard to such of his commercial transactions as are connected with that settlement." The ship President (1) was taken on a voyage from the Cape of Good Hope, then in possession of the Dutch, at war with us, to Europe, and claimed for Mr. J. Elmslie as a subject of America. It appeared that he had been a British-born subject, who had gone to the Cape of Good Hope during the last war, and had been employed as American consul at that place. Sir Wm. Scott said, "The court must, I think, surrender every principle on which it has acted in considering the question of national character, if it were to restore this vessel. The claimant is described to have been for many years settled at the Cape with an established house of trade, and as a merchant of that place, and must be taken as a subject of the enemy's country."

In the case too of the Indian Chief (2), Sir Wm. Scott said, "No position is more established than this, that if a person goes into another country, and engages in trade and resides there, he is by the law of nations to be considered as a merchant of that country." In the case of M'Connel and Hector (3), Lord Alvanley said, "That while an Englishman resides in a hostile country, he is a subject of that country." And upon the same principle in the case of De Luneville v. Phillips (4), the court, upon discovering that the plaintiff was resident in an enemy's country, refused to afford her relief. And Lord Ellenborough, in a subsequent case, declared, that if a British subject resides in an enemy's country, without being detained as a prisoner of

(1) 5 Rob. Rep. 277.
(2) 3 Rob. Rep. 12.
(3) 3 Bos. & Pul. 113.
(4) 2 New Rep. 97.

war, he is precluded from suing here, nor does it signify that he is recognized as a citizen of a neutral state (1); but in order to prevent a British subject who is in an enemy's country from suing here, it must be proved that his residence there was voluntary. (2)

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In the earlier part of the last war, a very general misapprehension prevailed among the American merchants, who conceived themselves entitled to retain the entire privilege of the American character, notwithstanding a residence and occupation in any other country. This misapprehension was, however, corrected by a great number of decisions of our courts. In the case of the Anna Catharina (3), a gentleman had been at first described as an American merchant; but upon further proof being required by the court, he was described as a person having a house of trade and actually living at Curacoa, then a Dutch possession. Under this description, Sir Wm. Scott said, " he is undoubtedly to be considered as an enemy at the commencement of this transaction, Holland being at that period of time the enemy of this country."

Upon the same principle, a foreigner lawfully residing within the British dominions has been held to be for various commercial purposes a British subject. In the case of the Indian Chief (4), a cargo, which belonged to Mr. Millar, an American consul resident at Calcutta, and which had been taken in trade with the enemy, was condemned as the property of a British merchant engaged in illegal commerce. " It is said to be hard," observed Sir Wm. Scott, " that Mr. Millar should incur the disabilities of a British subject, at the same time that he receives no advantage from that character; but I cannot accede to that representation, because he is in the actual receipt of the benefit of protection for his person and commerce from British arms and British laws; under an existing British administration in the country, he may be subject to some limitations of commerce incident to such establishments, which would not occur in Europe,

(1) O'Mealey v. Wilson, 1 Campb. 482; but in a subsequent case, it was held, at Nisi Prius, that an action may be maintained here by a neutral, on a promissory note given him by a British subject in an enemy's country for goods sold there. Houriet v. Morris, 3 Campb. 303.

(2) Roberts v. Hardy and others, 3 M. & S. 533.

(3) 4 Rob. Rep. 107.

(4) 3 Rob. Rep. 22.

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but he must take his situation with all its duties, and amongst those duties, the duty of not trading with the enemies of this country."

This general rule, that a person's settlement will impress him with the national character of the place where he is settled, is not confined to the instance of persons settling among enemies; it is admitted with great impartiality in all cases, and therefore, Lord Alvanley, in his judgment in the case of M'Connel and Hector (1), gave it as his own determination, and quoted as a further authority, the case of Marryatt v. Wilson (2), that an Englishman is entitled to all the privileges of a neutral country, while resident in a neutral country. So also, Sir Wm. Scott, in the case of the Emanuel (3), stated it as a general rule, that a person living bona fide in a neutral country, is fully entitled to carry on a trade to the same extent as the native merchants of the country in which he resides; provided it is not inconsistent with his native allegiance. And the same doctrine seems to have been decided, even beyond the reservation of native allegiance, in the case of Danvers (4), which was determined before the Lords. In this case a British-born subject, resident at the English factory at Lisbon, was allowed the benefit of a Portuguese character, so far as to render his trade with Holland, then at war with England, but not with Portugal, not impeachable as an illegal trade. It is true, that in the case of De Metton v. De Mello (5), Lord Ellenborough does not notice these decisions; but the observations of his Lordship in that case, particularly when coupled with the concluding part of his judgment, which advised that the plaintiff should go back to the Court of Admiralty, and have the matter set right there, appear to amount to nothing like a denial of the above doctrine. So it has been recently determined, that a natural-born subject of this country, domiciled in a foreign country in amity with this, may lawfully exercise the privileges of a subject of the country where he is domiciled, to trade with another country in hostility with this; and therefore, where the plaintiff in an action, being a British-born subject domiciled in America, effected a policy of assurance on freight and goods at and from Virginia to any port in the Baltic, and the ship was captured in her way to Elsineur

(1) 3 Bos. & Pul. 114.
(2) 1 Bos. & Pul. 43. 8 Term Rep. 31.
(3) 1 Rob. Rep. 296.
(4) 4 Rob. Rep. 255.
(5) 2 East. 234. 2 Campb. 420.

in Denmark, Denmark being in amity with America but at war with this country, it was held that the plaintiff was entitled to recover. (1)

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What constitutes a Residence.

We come now to the question, what constitutes residence? a question which at first sight almost seems to answer itself, but upon which the subtleties of foreign merchants have given birth to various disputes, and to several direct decisions; and yet there has been no disposition in the courts of admiralty to press the rule with any thing like rigour of construction. Sir Wm. Scott declared, in the case of the Bernon (2), "that he did not mean to lay down so harsh a rule, as that two voyages from France should make a man a Frenchman; but the claimant appearing to have had a continued residence there, during the interval of his voyages, and to have had that residence also with an intention of remaining, the property was condemned." For, from the whole of that case, it appears that the intention of remaining, the animus manendi, is the chief point to be considered by the court, in determining what shall be deemed a residence. "Whenever it appears," said Sir William Scott, "that the purchaser was in France, he must explain the circumstances of his residence there: the presumption arising from his residence is, that he is there animo manendi; it lies on him to explain it." The case of the Diana (3) affords us a further elucidation. There Sir William Scott decided, that "mere recency of establishment would not avail, if the intention of making a permanent residence there was fully fixed upon the party." He cited the case of Mr. Whitehill as fully establishing this point: "Mr. Whitehill, had arrived at St. Eustatius, then a hostile possession, only a day or two before Admiral Rodney and the British forces made their appearance, but it was proved that he had gone with an intention of establishing himself there, and his property was condemned; mere recency, therefore, would not be sufficient."

But when there is not really an animus manendi, an intention to continue the abode, then the abode is not considered as a residence to any hostile purpose; the case of the Ocean (4)

(1) Bell v. Reid, 1 M. & S. 726. Quære the policy of thus permitting a British subject, forgetting his natural allegiance and duty to his native country, to supply an enemy with goods.

(2) 1 Rob. Rep. 102.

(3) 5 Rob. Rep. 60.

(4) 5 Rob. Rep. 90.

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was the case of a claim given on behalf of Mr. F——, a British-born subject, who had been settled as a merchant in Flushing, but who, on the appearance of approaching hostilities, had taken means to move himself, and return to England. The affidavit of the claimant stated, that, in July 1803, he actually effected his escape, and returned to this country; that he had actually dissolved his partnership; and that he had continued to reside in Holland after the war, only under the detention so unwarrantably applied to all Englishmen resident in the country of the enemy at the breaking out of hostilities. "Under these circumstances," said Sir William Scott, "it would, I think, be going farther than the principle of law requires, to conclude this person, by his former occupation, and by his constrained residence in France, so as not to admit him to have taken himself out of the effect of supervening hostilities, by the means which he had used for his removal." The same point is incidentally but decisively laid down by Lord Ellenborough, in the cases of Bromley v. Heseltine (1), and O'Mealy v. Wilson. (2)

On the other hand, it must be observed, as Sir William Scott expressed it in the case of La Virginie (3), that the native character easily reverts, and that it requires fewer circumstances to constitute domicile in the case of a native subject, than to impress the national character on one who is originally of another country. The circumstances which drew this remark from the court, are simply these, that Mr. Lapiarre, by birth a Frenchman, was present in a French colony, where he shipped goods for France. The goods were captured, and he put in his claim as a merchant of America, where he had resided before his coming to the French colony. The court allowed, that if he had made the shipment for America, his asserted place of abode, it might have been a circumstance to be set in opposition to his actual presence in the French colony, and might afford a presumption that he was in St. Domingo only for temporary purposes; but the shipment being made to France from a French colony, and by a Frenchman, the presumption was, that he had returned to his native character of a French merchant.

The voluntary intention of remaining, therefore, being the material question in determining what is to be deemed a com-

(1) 1 Campb. 76.
(2) 1 Campb. 482.
(3) 5 Rob. Rep 98.

mercial residence, we shall find, that when the intention exists voluntarily and without force or restraint, the commercial residence is usually held to be complete, whether it be a literal and actual, or only an implied residence. In the case of the Indian Chief (1), it was objected against the claim of the captors, that the residence of an American in Calcutta was not a residence among British belligerents; that the Mogul having the imperial rights of Bengal, the King of Great Britain does not hold the British possessions in the East Indies in the right of the sovereignty; and that, therefore, the character of British merchants does not necessarily attach on foreigners locally resident there. This objection was thus overruled by Sir William Scott: "Taking it, that such a paramount sovereignty on the part of the Mogul princes really and solidly exists, and that Great Britain cannot be deemed to possess a sovereign right there, still it is to be remembered, that wherever even a mere factory is founded in the eastern parts of the world, European persons, trading under the shelter and protection of those establishments, are conceived to take their national character from that association under which they live and carry on their commerce. It is a rule of the law of nations, applying peculiarly to those countries, and is different from what prevails ordinarily in Europe and the western parts of the world, in which men take their present national character from the general character of the country in which they are resident; and this distinction arises from the nature and habit of the countries. In the western parts of the world, alien merchants mix in the society of the natives, access and intermixture are permitted, and they become incorporated to almost the full extent. But in the east, from the oldest times, an immiscible character has been kept up, foreigners are not admitted into the general body and mass of the society of the nation. They continue strangers and sojourners, as all their fathers were; not acquiring any national character under the general sovereignty of the country, and not trading under any recognised authority of their own original country, they have been held to derive their present character from that of the association or factory under whose protection they live and carry on their trade. With respect to establishments in Turkey, it was declared, in the case of Mr. Freemeaux, in the last war, that a merchant carrying on trade at Smyrna, under the protection of the Dutch consul at Smyrna, was to be considered

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(1) 3 Rob. Rep. 22.

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as a Dutchman, and in that case the ship and goods belonging to Mr. Freemeaux being taken after the order of reprisals against Holland, were condemned as Dutch property. So in China, and I may say generally throughout the East, persons admitted into a factory, are not known in their own peculiar national character, and not being admitted to assume the character of the country, they are considered only in the character of that association or factory. I remember perfectly well, in the case of Mr. Constant de Rubecque, it was the opinion of the Lords, that although he was a Swiss by birth, and no Frenchman, yet if he had continued to trade in the French factory in China, which he had fortunately quitted before the time of capture, he would have been liable to be considered as a Frenchman. I am, however, inclined to think, that these considerations are unnecessary, because, though the sovereignty of the Mogul is occasionally brought forward for purposes of policy, it hardly exists otherwise than as a phantom. It is not applied in any way for the actual regulation of our establishments; this country exercises the power of declaring war and peace, which is among the strongest marks of actual sovereignty; and if the high, or as I may almost say, this empyrean sovereignty of the Mogul is sometimes brought down from the clouds, as it were, for purposes of policy, it by no means interferes with that actual authority which this country and the East India company, a creature of this country, exercises there with full effect. The law of treason, I apprehend, would apply to Europeans living there in full force; it is nothing to say, that some particular parts of our civil code are not applicable to the religious or civil habits of the Mahomedan or Hindoo natives, and that they are, on that account, allowed to remain under their own laws. I say this is no exception, for, with respect to internal regulations, there is, amongst ourselves, in this country, a particular sect, the Jews, that, in matters of legitimacy, and on other important subjects, are governed by their own particular regulations, and not by all the municipal laws of this country, some of which are totally inapplicable to them. It is besides observable, that our own acts of parliament, and our public treaties, have been by no means scrupulous, in later times, in describing the country in question as the territory of Great Britain. In the American treaty, the particular expression occurs, that the citizens of America shall be admitted and hospitably received in all the sea-ports and harbours of the British territories in India. The late case in the court of King's

Bench, Wilson v. Maryat (1), arising upon the interpretation of that treaty, and in which it appears to have been the inclination of that court to hold our possessions in India to come within the operation of the Navigation Acts, gave occasion to an act of parliament, in which the term British territory is borrowed from the treaty. There is likewise a general act, of 37 Geo. 3. c. 117., for the allowance of neutral traders in India, which expressly uses the same term, reciting that whereas it is expedient that the ships and vessels of countries and states in amity with his Majesty, should be allowed to import goods and commodities into, and export the same from, the British territories in India. It is, besides, an obvious question, To whom are the credentials of this gentleman, as consul, addressed? Certainly to the British government, to the East India company, and not to the Mogul. What is the condition of a foreign merchant residing there? From attention to the argument of a gentleman, whose researches have been particularly turned to subjects connected with the East, I have made inquiry of a person of the greatest authority on such a subject, who is just returned from the highest judicial situation in that country, and the result is, as on general principles I should certainly have expected, that a foreign merchant, resident there, is just in the same situation with a British merchant, subject to the same obligations, bound by the same duties, and amenable to the same common authority of British tribunals. It being insinuated in the same case, as a further objection, that Mr. Miller was not a general merchant of Calcutta, Sir Wm. Scott shortly observed upon it in these words (2): "Whether he was a general merchant or not is totally immaterial, for if this was even his first adventure, still, in this transaction, he must be taken as a merchant, and can be considered in no other character."

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The case of the Junge Ruiter (3) establishes, that when a person has fixed his residence, with a voluntary intention of remaining, his national character, communicated by that residence, will not be divested by his periodical absence on account of professional avocations.

Residence of an agent.

Nor does it appear to be invariably necessary, that in order to impress a man with a national character, his residence must

(1) 8 Term Rep. 31. 1 Bos. and Pul. 430.

(2) 3 Rob. Rep. 27, 8.

(3) 1 Acton, 116.

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be personal. In the case of the Anna Catharina (1), a contract had been made with a hostile government; a contract which, from the peculiar privileges annexed to it, not only placed the contractors, being neutrals, upon the footing of Spanish subjects, but perhaps might be considered as going further still, and giving them privileges to which a Spanish merchant, merely as a native subject of Spain, would probably not have been admitted. For the purpose of executing this contract, the merchants engaged in it thought fit, not indeed to reside themselves in the hostile territory, but to commission an agent, who did reside there. On this residence by agent Sir William Scott thus animadverted in his judgment:—"It is not indeed held in general cases, that a neutral merchant, trading in an ordinary manner to the country of a belligerent (2), does contract the character of a person domiciled there by the mere residence of a stationed agent; because in general cases the effect of such a residence is counteracted by the nature of the trade, and the neutral character of the British merchant himself. But it may be very different where the principal is not trading on the ordinary footing of a foreign merchant, but as a privileged trader of the enemy. There the nature of his trade does not protect him; on the contrary, the trade itself is the privileged trade of the enemy, putting him on the same footing as their own subjects, and even above it." But though this judgment shews that a merchant, trading to a foreign nation, does not in general contract the character of that nation by the residence of a stationed agent, yet when the agent so residing performs duties for his employer which imply that this employer considers himself as being virtually a resident of the country where in fact his agent resides, that is, in short, where the agent, instead of being the mere factor, becomes the deputy of his employer, it should appear that then the employer will be considered as sufficiently invested with the national character by the residence of his agent. Thus a person holding the office of a consul in a foreign state, though he do not reside there himself, but commit his whole duty to vice-consuls, must be deemed to be virtually a resident of that state where the commission of his office implies him to reside: and the appointment of deputies is a proof that he still considers himself as retaining the office to which this implied residence attaches, though he may have found it convenient to avoid the personal burthen of its functions. This distinction between those agents who are

(1) 4 Rob. Rep. 107. (2) 4 Rob. Rep. 119.

mere factors, and those who may be considered as deputies, may be inferred from the comparison of the decision last cited with a decision of the same judge, in the case of the Dree Gebroeders (1): the claimant, who represented himself as an American stated in his affidavit, that the government of the United States had appointed him consul-general for Scotland, but that he had not yet acted further in that capacity than to appoint deputies. Sir William Scott said, " It will be a strong circumstance to affect him with a British residence as long as there are persons acting in an official situation here, and deriving their authority from him."

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Mode of residence.

But whether the residence of the party be personal or by agent, the external circumstances need not be notorious nor numerous, in order to establish the fact that the party is so resident; the intention of permanent abode will still be the decisive proof. In the case of the Jonge Klassina (2), the claimant, wishing to persuade the Court that he was not to be deemed a resident in the hostile country, pleaded, that he had no fixed compting-house there; upon which plea Sir William Scott gave the following determination:—" That he has no fixed compting-house in the enemy's country will not be decisive. How much of the great mercantile concerns of this kindgom is carried on in coffee-houses? A very considerable portion of the great insurance business is so conducted. It is indeed a vain idea, that a compting-house or fixed establishment is necessary to make a man a merchant of any place; if he is there himself, and acts as a merchant of that place, it is sufficient; and the mere want of a fixed compting-house there will make no breach in the mercantile character, which may well exist without it." As by the commencement of a residence in a hostile state, a hostile character is acquired, so it is terminated by the cessation of that residence. This is decided in the case of the Indian Chief (3).

Character imposed by traffic.

Having said thus much respecting national character, as impressed by the actual residence of the party himself, or of his agent, we will now examine a doctrine nearly connected with the question of residence, and laid down by Sir William Scott, in the case of the Vigilantia (4). " It is," says that learned Judge, " a doctrine supported by strong principles of equity and propriety, that there is a traffic which stamps a national character

(1) 4 Rob. Rep. 232.
(2) 5 Rob. Rep. 297.
(3) 3 Rob. Rep. 12.
(4) 1 Rob. Rep. 13; and see also the case of the Portland. 3 Rob. Rep. 41.

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in the individual, independent of that character which mere personal residence may give. And it was expressly laid down in the case of the Nancy and other ships, which was heard before the Lords on the 9th of April 1798, that if a person entered into a house of trade in the enemy's country in time of war, or continued that connection during the war, he should not protect himself by mere residence in a neutral country."—This position, that he who maintained an establishment, or house of commerce, in a hostile country, is to be considered as impressed with a hostile character, with reference to so much of his commerce as may be connected with that establishment, is confirmed by a great variety of other cases; which prove too that the rule is the same, whether he maintain that establishment as a partner, or as a sole trader. (1)

General rules.

Upon the whole, it may be received as a general rule, that the maintenance of a commercial house in a hostile country, or such a sojourning as the courts construe to be a residence, either personally or by agent, will impart a national character; that the subject of a belligerent, residing or maintaining a commercial house amongst the subjects of the adverse belligerent, who are the enemies of his country, must be deemed an enemy, with reference to the seizure of so much of his property concerned in commerce as is connected with his residence or establishment there: that a neutral, residing or maintaining a commercial establishment among the subjects of one belligerent state, is to be deemed an enemy by the other, with reference to the seizure of so much of his property concerned in commerce as is connected with his residence or establishment; that the subject of a belligerent state, residing or maintaining a commercial establishment among neutrals, is to be deemed a neutral, both by his native government, and by the adverse belligerent, with reference as well to the trade which he may carry on with the adverse belligerent, as to his trade with all the rest of the world.

The residence only affects the particular trade.

But though a belligerent nation has a right to consider as enemies all who reside or maintain commercial establishments in a hostile country, whether they be by birth neutrals, or whether they be by birth her own subjects or allies, yet it is with this qualification, that they are to be deemed enemies only with reference to the seizure of so much of their commerce as is connected with that residence or establishment. Sir William Scott lays it

(1) 3 Rob. Rep. 41.

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down, in the case of the Jonge Klassina (1), "That a man having mercantile concerns in two countries, and acting as a merchant of both, must be liable to be considered as a subject of both, with regard to the transactions originating respectively in those countries." In the case too of the Herman (2), we find the same distinguished authority thus remarking upon the facts before the Court:—"The personal domicile of the claimant is at Embden, where he resides, and has a house of trade; he is only connected with this country by his partnership in a house here, which is to be taken in a manner as collateral and secondary to his house at Embden: that he may carry on trade with the enemy at his house in Embden cannot be denied, provided it does not originate from his house at London, nor vest an interest in that house."

The case of the Portland, and nine other ships (3), still more precisely establishes the distinction, in respect of liability to capture, between the trade which a merchant may be carrying on to his hostile, and that which he may be carrying on to his neutral establishment. The claimant resided in a neutral territory, but he had two settlements, or places of resort for his business; one in a neutral territory, and the other in a hostile country, at Ostend. Sir William Scott said, "As to the circumstance of his being engaged in trading with Ostend, I think it will be difficult to extend the consequences of that act, whatever they may be, to the trade which he was carrying on at Hamburgh, and having no connection with Ostend; because, call it what you please, a colourable character, as to the trade carried on at Ostend, I cannot think that it will give such a colour to his other commerce as to make that liable for the frauds of his Ostend trade; as far as the person is concerned, there is a neutral residence; as far as the commerce is concerned, the nature of the transaction and the destination are perfectly neutral, unless it can be said that trading in an enemy's commerce makes the man, as to all his concerns, an enemy; or that, being engaged in a house of trade in the enemy's country, would give a general character to all his transactions. I do not see how the consequences of Mr. Ostermeyer's trading to Ostend can affect his commerce in other parts of the world. I know of no case, nor of any principle, that would support such a position as this—that a man having a house of trade in the enemy's country,

(1) 5 Rob. Rep. 297.
(2) 4 Rob. Rep. 228.
(3) 3 Rob. Rep. 41.

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as well as in a neutral country, should be considered in his whole concerns as an enemy's merchant, as well in those which respected solely his neutral house, as in those which belonged to his belligerent domicile." (1)

The rights of capture in respect of residence, or commercial establishment, are not enforced with any inequitable severity. In the case of the Vigilantia (2), Sir William Scott cites a judgment pronounced by the Lords Commissioners of Appeal, wherein they said, that " a person carrying on trade habitually in the country of the enemy, though not resident there, should have time to withdraw himself from that commerce; and that it would press too heavily on neutrals, to say, that immediately on the first breaking out of a war, their goods should become subject to confiscation."

Hostile character by particular trading.

The next mode in which a hostile character may be impressed, is by dealing in those branches of commerce which are usually confined to the subjects of the adverse belligerents themselves. The rule on this point may be collected from the case of the Princessa. (3)

" This," said Sir William Scott, " is a Spanish frigate, employed as a packet of the king of Spain, to bring bullion and specie from South America to Old Spain: and I think the presumption is most strong, that none but Spanish subjects are entitled to the privilege of having money brought from that colony to Spain. I have looked carefully through the manifest, and I perceive there is not one shipment but in the name of Spaniards; therefore it appears that this is not an ordinary trade; and I must take this to be property which must have been considered as Spanish, and which could not have been exported in any other character. It has been decided by the Lords, in several cases, that the property of British merchants, even shipped before the war, yet if in a Spanish character, and in a trade so exclusively peculiar to Spanish subjects, as that no foreign name could appear in it, must take the consequences of that character, and be considered as Spanish property."

That he who is permitted by the enemy to deal, and does deal accordingly, in branches of commerce usually confined to the subjects of the enemy, must be deemed an enemy himself, is

(1) See Bromley v. Hesseltine, 1 Camp. 76.

(2) 1 Rob. Rep. 1.

(3) 2 Rob. Rep. 49.

further established by the case of the Anna Catharina (1), in which there was a contract between the Spanish government, then at war with this country, and certain persons claiming to be considered as neutrals. But the Court held, that as the contract was of so privileged a nature, that none but Spanish merchants would have been admitted to it, and not even Spanish merchants merely as such, it did in fact carry with it, in the hands of the contractors, a character decidedly Spanish; and that character was held to adhere to the contract, not only in the hands of the party with whom it was originally made, but where in the hands of those whom he had subsequently admitted to share it. "It is by nothing peculiar in his own character," said Sir William Scott, "that the original contractor would be liable to be considered as a Spanish merchant, but merely by the acceptance of this contract, and by acting upon it. If other persons take their share, and accept those benefits, they take their share also in the legal effects. They accepted his privileges; they adopted his resident agent. It would be monstrous to say that the effect of the original contract is to give the Spanish character to the contracting person, but that he may dole it out to an hundred other persons, who in their respective portions are to have the entire benefit, but are not to be liable to the effect of any such imputations. The consequence would be, that such a contract would be protected, in the only mode in which it could be carried into effect; for a contract of such extent must be distributed; and if every subordinate person is protected, then here is a contract which concludes the original undertaker of the whole, but in no degree affects one of those persons who carry that whole into execution On these grounds, I am of opinion that these goods are liable to be considered as the property of the Spanish government; and further, that these parties are liable to be considered as persons clothed in this transaction with the character of Spanish merchants."

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Within the rule which thus annexes a hostile character to the property of the neutral engaged in a trade peculiar to the enemy, falls of course the instance of a strict exclusive colonial trade, from the colony of the mother country, where the trade is limited to native subjects by the fundamental regulations of the state, and the national character is required to be established by oath,

Carrying on colonial trade.

(1) 4 Rob. Rep. 107

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as in the case of the Spanish register ships. It was in the case of the Vrow Anna Catharina (1), that Sir Wm. Scott particularized this instance of the Spanish register ships: and he added, that whosoever asserts himself to be the proprietor by the solemn averments of an oath, takes the fortunes of the community as to that property.

Sailing under enemy's flag, simulated papers, &c. (2)

There are yet other modes in which a hostile character may be affixed to property, such is the sailing of the vessel under the flag and pass of an enemy: the case which most distinctly decides this point, is that of the Elizabeth (3). "By the established rules of law," said the Court, "it has been decided, that a vessel sailing under the colours and pass of a nation, is to be considered as clothed with the national character of that country. With goods it may be otherwise; but ships have a peculiar character impressed upon them by the special nature of their documents, and have always been held to the character with which they are so invested, to the exclusion of any claims of interest that persons living in neutral countries may actually have in them. In the war before the last, this principle was strongly recognized in the case of a ship taken on a voyage from Surinam to Amsterdam, and documented as a Dutch ship. Claims were made for specific shares, on behalf of persons residing in Switzerland; and one claim was on behalf of a lady to whom a share had devolved by inheritance, whether during hostilities or no, I do not accurately remember; but if it was so, she had done no act whatever with regard to that property, and it might be said to have dropped by mere accident into her lap. In that case, however, it was held, that the fact of sailing under the Dutch flag and pass was decisive against the admission of any claim; and it was observed, that as the vessel had been enjoying the privileges of a Dutch character, the parties could not expect to reap the ad-

(1) 5 Rob. Rep. 161.

(2) An assured upon a policy on ship not having leave to carry simulated papers cannot recover for a loss by capture, if it appear by the sentence of the foreign prize court, that one of the causes stated for the condemnation was the carrying of simulated papers. Korneyer v. Lushington. 15 East, 49. 3 Campb. 85. S. C. Oswell v. Vigne, 15 East, 70. Fomin v. Oswell, 3 Campb. 357. Mercurius, 1 Rob. 288.

(3) 5 Rob. Rep. 2. But in Oswell v. Vigne, 15 East, 73, per Bayley, J. carrying false colours could not be a ground of condemnation; and per Lord Ellenborough, J. carrying a variety of colours has never been considered as a contravention of the law of nations.

vantages of such an employment without being subject, at the same time, to the inconveniences attaching on it." To this case of the Elizabeth (1), Dr. Robinson has subjoined a note, containing a report of the case of the Vreede Schottys, in which the Court laid down the distinction as to hostility of character between the ships and the cargo, in the following terms: "A great distinction has been always made by the nations of Europe between ships and goods; some countries have gone so far as to make the flag and pass of the ship conclusive on the cargo also, but this country has never carried the principle to that extent. It holds the ship bound by the character imposed upon it by the authority of the government from which all the documents issue. But goods which have no such dependence upon the authority of the state, may be differently considered." The immunity of neutral cargoes on board an enemy's ship is also asserted by Vattel. (2)

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Transfers of property in transitu.

These are the principal circumstances which have been held by the courts of international law, to impress an hostile character upon commerce. When property has borne such character at the commencement of the voyage, the general rule seems to be, that it cannot change that character on its passage, or, as it is generally expressed, in transitu. It was even decided in the case of the Danekebaar Affricaan (3), that property sent from a hostile colony and captured in the voyage, did not change its character in transitu, although, before the capture, the owners had become British subjects by the colony's capitulation. The principle had been originally stated in the case of the Neegotie en Zeevart, which is cited by Sir Wm. Scott in his judgment in the Danekebaar Affricaan.

Attempts to evade these Rules.

We will now consider the attempts which have been made to protect this hostile commerce by fraudulent contrivances of various descriptions: a belligerent not unfrequently attempts to save the property, which he has already shipped, from the capture of his adversaries, by assigning it, while on the voyage, to neutrals. This practice has been held by the courts to be unavailing for its protection. "During peace," says Sir Wm. Scott, in giving judgment upon the case of the Vrow Margarittha (4), "a transfer in transitu may certainly be made; but

(1) 5 Rob. Rep. 2.
(2) Lib. 3. c. 7. s. 107.
(3) 1 Rob. Rep. 107.; see also 3 Rob. Rep. 197.
(4) 1 Rob. Rep. 338.

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in a state of war existing or imminent, (that is, whether the war have actually broken out, or whether it be in the expectation of the parties), it is held, that the property shall be deemed to continue as it was at the time of shipment, till the actual delivery; this arises out of the state of war, which gives a belligerent a right to stop the goods of his enemy; if such a rule did not exist, all goods shipped in an enemy's country would be protected by transfers, which it would be impossible to detect. It is on that principle held, I believe, as a general rule, that property cannot be converted in transitu, and in that sense I recognize it as the rule of this court. (1)"

The illegality of transfer in transitu during, or in contemplation of war, is shewn at great length by Sir Wm. Scott, in the case of the Jan Frederick (2); but where the contract was made in contemplation of peace, after the signature of preliminaries, as in the case of the Vrow Catharina (3), the court held that the transfer was legal, as not tending to defeat a belligerent's right of capture. All these are cases of bonâ fide transfers, but in many instances a belligerent finding it impossible to protect his own trade under his own flag, transfers it to a neutral fraudulently; that is, either nominally or without reservation of its solid advantages to himself, or actually for a time, with a condition that the neutral shall restore it on the conclusion of peace. All these colourable transfers are held to be illegal, and the circumstances of them are as various as may be expected from the ingenuity of men who have great interests at stake. The cases arising upon these and other frauds are almost all mere questions of evidence, turning solely on the construction which the transaction can be made to bear, by the acuteness of the captors on the one hand in tracking the deceit, and by the dexterity of the claimants on the other, in eluding the investigation. (4)

Reservations of risk to the neutral consignors, in order to protect belligerent consignees, are uniformly treated by the Admiralty court as fraudulent and invalid. The principle case on this point, is that of the Sally (5). The cargo, which occasioned the question in the case of the Sally, had been shipped during the

(1) 1 Burr. 147.
(2) 5 Rob. Rep. 128.
(3) 5 Rob. Rep. 161.
(4) See the several instances and decisions, 1 Rob. Rep. 1. 101. 122. 1 Acton, 43. 2 Rob. 137. 1 Rob. 16. note. 4 Rob. 32.
(5) 5 Rob. Rep. 300.

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last war, ostensibly on the account of American merchants: the master deposed as to his belief, that it would have become the property of the French government upon being unladen. The sale, therefore, had obviously been completed, and the pretext of an American risk and account, was merely to evade that capture, to which the cargo would have been subject if it had sailed avowedly as French property: the Court said, "It had always been the rule of the Prize Court, that property going to be delivered in the enemy's country, and under a contract to become the property of the enemy immediately on arrival, if taken in transitu is to be considered as enemy's property. When the contract is made in time of peace, or without any contemplation of a war, no such rule exists. But in a case like the present, where the form of the contract was framed directly for the purpose of obviating the danger apprehended from approaching hostilities, it is a rule which unavoidably must take place. The bill of lading expresses account and risk of the American merchants; but papers alone make no proof, unless supported by the depositions of the master; instead of supporting the contents of his papers, the master deposes that on arrival the goods would become the property of the French government; and all the concealed papers strongly support him in this testimony. The evidentia rei is too strong to admit further proof; supposing it was to become the property of the enemy on delivery, capture is considered as delivery. The captors, by the rights of war, stand in the place of the enemy, and are either entitled to a condemnation of goods passing under such a contract, as of enemy's property; on every principle on which prize courts can proceed, this cargo must be considered as enemy's property."

The principles on which this judgement was given are stated more at large in the case of the Packet de Bilboa (1), and of the Anna Catharina. (2)

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Thirdly, *we are to consider the right of capture or seizure by the respective belligerents of each other's property, so far as it affects commerce.* It was justly observed by the king's advocate, in the case of Potts v. Bell (4), that there is no such thing as a war

(1) 2 Rob. Rep. 133.
(2) 4 Rob. Rep. 107.
(3) See division of the subject ante, 377. As to the law of captures in general, see Horne on Captures; Woodes Vin Lect.; Schlegel on Captures; Beawes, 6 Ed. 1 Vol. 319.
(4) 8 Term Rep. 548.

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for arms, and a peace for commerce. The commerce of the enemy has in all ages been considered as the legitimate prize of war, unless exempted by express treaty or stipulation. The rights of war, as they may be lawfully exercised against hostile commerce, are discussed at large in the third book of Grotius, ch. 6, and in the third book of Vattel, chapters 8 and 9. The doctrines laid down in these and in other treatises on international law, are condensed in the following passage, which is an extract from a summary of the laws of nations, compiled by Professor Martens of Gottingen (1): "The conqueror has a right to seize on the property of the enemy, whether moveable or immoveable. These seizures may be made, 1st, in order to obtain what he demands as his due, or an equivalent; 2dly, to defray the expenses of the war; 3dly, to force the enemy to an equitable peace; 4thly, to deter him, or by reducing his strength, hinder him from repeating in future the injuries which have been the cause of the war. And, with this last object in view, a power at war has a right to destroy the property and possessions of the enemy, for the express purpose of doing him mischief. However, the modern laws of war do not permit the destruction of any thing, except, 1st, such things as the enemy cannot be deprived of by any other means than those of destruction, and which it is at the same time necessary to deprive him of; 2dly, such things as, after being taken, cannot be kept, and which might, if not destroyed, strengthen the enemy; 3dly, such things as cannot be preserved without injury to the military operations; to all these we may had, 4thly, whatever is destroyed by way of retaliation." This is the general rule as to the right of seizure. But, in strict justice, that right can take effect only on those possessions of a belligerent which have come to the hands of his adversary after the declaration of hostilities. "The sovereign," says Vattel (2), "can neither detain the persons nor the property of those subjects of the enemy who are within his dominions at the time of the declaration. They came into his country under the public faith. By permitting them to enter and reside in his territories, he tacitly promised them full liberty and security for their return. He is therefore bound to allow them a reasonable time for withdrawing with their effects; and if they stay beyond the term prescribed, he has a right to treat them as enemies, as unarmed enemies however: but if they are detained

(1) Lib. 8. c. 3. s. 9. page 287, 8.

(2) Vatt. b. 3. . . 4. sect. 63.

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by an insurmountable impediment, as by sickness, he must necessarily, and for the same reason, grant them a sufficient extension of the term. At present, so far from being wanting in this duty, sovereigns carry their attention to humanity still farther, so that foreigners who are subjects of the state against which war is declared, are very frequently allowed full time for the settlement of their affairs. This is observed in a particular manner with regard to merchants; and the case is moreover carefully provided for in commercial treaties. (1)

Of embargoes preceding declaration of war. (2)

At first sight it would appear, that this rule of faith and justice is totally violated by the practice, so common in modern Europe, and so much reprobated by some, of imposing embargoes at the breaking out of hostility (3). But, upon examining a little more carefully the nature of the transaction, we shall find, that there is not this violent infraction of honesty or honour. Embargoes, the effect of which is to detain vessels in the ports where they may be lying, are imposed on various occasions and for various purposes. They are of two descriptions, warlike or civil. The only species of embargo, which it is necessary for us to consider in this place, is that which, in its nature, partakes of hostility. It is imposed by a nation upon such foreign vessels within her ports as belong to states against whom she has declared war, or is about to declare it. Now we may remember

(1) Ante 42, 3. Marten's L. N. 276, 7.

(2) Of these embargoes in general see observations in Beale v. Thompson, 4 East, 546; 1 Dow. Rep. 299; and Hadley v. Clarke, 8 T. R. 259. From these it appears that a temporary embargo afterwards removed only suspends, and does not annul a contract between two subjects of the same state; and see Marten's L. N. 268, 9. But an embargo laid by one state upon the property of its subjects in the ports of that country puts an end to an insurance on such property effected by a British subject. And therefore, in Conway v. Gray, 10 East, 536, it was held that a foreigner insuring in this country his ship or goods on a voyage, is not entitled to abandon upon an embargo laid on the property in the ports of his own country, as his assent is virtually implied to every act of his own government, and makes such embargo his own voluntary act; and Lord Ellenborough (J.) in delivering the opinion of the Court said, "In all questions arising between the subjects of different states, each is a party to the public authoritative acts of his own government, and on that account a foreign subject is as much incapacitated from making the consequences of an act of his own state the foundation of a claim to indemnity upon a British subject in a British court of justice, as he would be if such act had been done immediately and individually by such foreign subject himself."

(3) See Beawes Lex Mer, 6 Ed. 397. Marten's L. N. 274, 5, 6.

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the rule, as Vattel lays it down, to be, that a nation is not at liberty to seize that part of her enemy's property which is in her dominions at the time of the declaration, because it came into her power upon the faith of previously existing peace. But declarations of war are not construed to take effect merely from the time when a formal notification of hostility is given; there are certain preceding acts, of a hostile nature, which are deemed to be virtually declarations of war, to certain intents and purposes, though they may be explained away and annulled by a subsequent accommodation between the governments (1). When, therefore, a nation receives certain injuries, for which she sees no prospect of obtaining redress, she is reduced to consider hostilities as virtually declared, and issues an embargo upon the commerce of the offending state, then lying within her ports, in order to indemnify herself in the only way in which, perhaps, it may be possible for her to obtain indemnification at all. In this case, the hostile property, which comes to her hands after the commission of the injury, may be, and is regarded, as having come to her hands after the declaration of hostilities, though that declaration have not been duly and formally notified; and therefore, the case of embargo is not within the prohibition of Vattel, which reaches to the exemption only of goods in our hands at the time of the declaration, and does not cover property coming into our territory after that declaration, whether such declaration be only virtual, or whether it be announced with all the fulness of formality. Upon the right of seizing on property under this implied kind of declaration, and upon the effect of the seizure in the event of an accommodation being adjusted before the formal notification of war, Sir William Scott most satisfactorily comments in the case of the Boedes Lust (2). In that case, an embargo had been laid upon Dutch property by Great Britain, previously to an open declaration of war, but under such circumstances of injustice on the part of Holland, as were considered by the British court as amounting to an implied declaration of war; and the formal declaration, which afterwards supervened, was deemed to have a retrospective effect, confirming all that had been done by the embargo under the implied declaration. "The seizure," said Sir William Scott, "was at first equivocal, and if the matter in dispute had terminated in reconciliation, the seizure would have been converted into a mere civil embargo, so terminated. That would have

(1) Ante, 392.

(2) 5 Rob. Rep. 246. and see Beale v. Thompson, 4 East, 560.

been the retroactive effect of that course of circumstances. On the contrary, if the transactions end in hostility, the retroactive effect is directly the other way. It impresses the direct hostile character upon the original seizure; it is declared to be no embargo; it is no longer an equivocal act, subject to two interpretations; there is a declaration of the animus by which it is done; that it was done hostili animo, and is to be considered as an hostile measure ab initio. The property taken is liable to be used as the property of persons trespassers ab initio, and guilty of injuries which they have refused to redeem by any amicable alteration of their measures. This is the necessary course, if no particular compact intervenes for the restitution of such property taken before a formal declaration of hostilities." So, in the case of the Herstelder (1), Sir William Scott observed, "That actual hostilities are not to be reckoned merely from the date of the declaration, but that such declaration has been applied with a retroactive force."

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Embargoes, we have seen (2), are of two kinds, warlike, and civil embargoes; the former are enforced against enemies, the others are employed in the case of allies and subjects. The first kind of embargo is usually issued by a state in time of war or threatened hostilities, prohibiting the departure of ships or goods from some, or all of the ports of such state until further order. And Beawes, in his Lex Mercatoria (3), speaking of the civil embargo, says, "That it is laid on ships and merchandize in the ports of this kingdom by virtue of the King's proclamation, and is strictly legal, when the proclamation does not contravene the ancient laws, or tend to establish new ones, but only to enforce the execution of such laws as are already in being, in such manner as the King shall judge necessary (4)." Thus observes Mr. Justice Blackstone (5): "The law is, that the King may prohibit any individual of his subjects from leaving the realm. A proclamation therefore, forbidding this, in general for three weeks, by laying an embargo upon all shipping in time of war, will be equally binding with an act of parliament, because founded on a prior law."

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(1) 1 Rob. Rep. 114.

(2) Ante, 415. Skinner, 335. as to the King's right to impose embargoes.

(3) Beawes, 271. 4 Mod. 177. 179. Skinner, 93. 335. 1 Salk. 32. 3 Inst. 162.

(4) Jenkins. 2 Cent. 745.

(5) 1 Bla. Com. ch. 7.

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But this civil embargo cannot be imposed upon British ships in a foreign port, unless by the concurring authority of the state to which that port belongs; for the King has no right to disturb the peace of neighbouring nations by any seizures, however useful to the interests of his own people. This may be collected from the judgment of Sir William Scott, in the case of the Gertruyda (1). Even within the jurisdiction of this kingdom the prerogative of the King, with respect to the imposition of embargoes, is of a nature by no means unlimited, or absolute. Among the many reports that are to be found, of the great case of Sands and the East India Company, there is one in Salkeld, p. 32, where it is set down as agreed, that the King may lay embargoes; but then it must be for the public good, and not for the private advantage of a particular trader or company; and the embargo which was issued by his Majesty to prevent the exportation of corn in 1766, is noticed by Beawes in his Lex Mercatoria, p. 276, as having been illegally imposed, such exportation, says he, being allowed by law at the time; and therefore the preamble to the Stat. 7 Geo. 3. ch. 7. for indemnifying all persons advising or acting under the order of council laying an embargo on all ships laden with corn or flour, during the recess of parliament in 1766, says, "which order could not be justified by law, but was so much for the service of the public, and so necessary for the safety and perservation of his Majesty's subjects, that it ought to be justified by act of parliament." This embargo, as was allowed, saved the people from famine; yet it was declared illegal by the above act of the legislature, including the King himself, who laid it, which was therefore needful to sanction it; and the proprietors of the embargoed ships and cargoes were accordingly indemnified by government.

Of Letters of Marque and Reprisal. (2)

The necessity of vesting the sole right of granting letters of marque and reprisal in the sovereign, is obvious; were the law otherwise, each private sufferer would be a judge in his own cause. The statute 4 Hen. 5. c. 7. accordingly declares, "That if any subjects of the realm are oppressed in time of truce by any foreigners, the King will grant marque in due form to all that feel themselves grieved, which form is thus directed to be

(1) 2 Rob. Rep. 211.

(2) As to letters of marque in general, see 1 Bla. Com. 251. 4 Hen. 5. c. 7. 1 Wooddes. Vin. Lec. 34. Vin. Abr. Prerogative, N. a. Com. Dig. Prerogative, B. 4. Marten's L. N. 268 to 271.

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observed: the sufferer must first apply to the Lord Privy Seal, and he shall make out letters of request under the privy seal; and if, after such request of satisfaction made, the party required do not, within convenient time, make due satisfaction or restitution to the party grieved, the Lord Chancellor shall make him out letters of marque under the great seal, and by virtue of these, he may attack and seize the property of the aggressor nation, without hazard of being condemned as a robber or pirate." The case provided for by this statute, is only the case of injuries done to subjects by foreigners during peace; but the letters of marque which are granted during war, are also, says Molloy (1), grantable with the approbation of the King, or council, or both; and I am inclined to think one reason of committing such a prerogative to the crown may be this,—that as the property of a ship, taken without a letter of marque, vests in the King (2), he ought, in justice, to have a discretion by himself, or his officers, as to the persons who shall thus take out commissions thus tending to abridge his revenue.

Letters which have been so granted, may be vacated in three ways; by express revocation, or by a cessation of hostilities between the nations which they affect, or by the misconduct of the grantees. Letters granted during war, having usually been designed only for the general annoyance of the enemy, may be vacated by the mere express revocation of his Majesty. But with regard to letters granted during peace, by way of reparation to subjects for losses actually sustained by them from foreigners, these, says Molloy (3), can be revoked by no domestic act of the government, because, after the person injured has petitioned, and made legal proof of his loss, and letters of request have gone, and no reparation been made, then the letters of reprisal being sealed, create and vest a national debt in the grantee. Even this claim, however, is defeated by the cessation of hostilities, as appears from a case decided by the Lord Chancellor Nottingham (4). The defendant, as executor, was entitled to letters of reprisal, granted by the king, for a great sum of money, and containing a clause, that no treaty of peace should prejudice them. But his Majesty afterwards, by several treaties of peace with the Dutch, expressly articled that they should not be damnified by these letters patent. The question was, whether the

(1) Molloy, B. 1. ch. 2. s. 10.
(2) Vin. Ab. Prerog. N. a. pl. 22.
(3) Lib. 1. ch. 2. s. 8.
(4) 2 Wooddes. 440. 1 Vern. 54.

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King could, by any treaty of peace, annul, or, in the technical phrase, amortise this instrument. That great judge was of opinion that letters of reprisal might be revoked and amortised by a truce, and by letters of safe-conduct, and a fortiori by a treaty of peace. It seems just and reasonable, that, after a solemn ratification of amity between nations, no retrospect of private grievances, unprovided for by the convention, should be allowed.

The third method in which letters of marque may become vacated, is by the misconduct of the grantees. In the case of the Mariamne (1), Sir William Scott laid it down that cruelty works a forfeiture of the letters of marque; and this he affirmed to be the ancient law of the Admiralty, of which the Prize Act, containing the same provision, was to be taken as a formal declaration. "During the contest," said he, "destruction is necessary and lawful; but it is contrary to every principle of the law of nations, that after the contest has ceased, hostile and destructive force should still be continued."

The Prize Act 43 Geo. 3. (2) contains several provisions for the revocation of letters of marque; which being regulations of a nature merely municipal, may be made and varied at the will of the legislature, whose power, of course, is paramount even to the prerogatives of the crown. It has been decided (3) that a subject of the King cannot take goods belonging to the subjects of a prince in amity with the King, by virtue of letters of marque granted by any other sovereign or state.

But letters granted by the King of this country are not construed strictly against the subject: for in the case of the Sacra Familia (4), it was decided that a vessel cruizing under letters of marque against one state, as for instance, against France, is at liberty, on obtaining notice of hostilities commencing against another, as for instance against Spain, to capture a Spanish vessel, with as full advantage to herself as if the prize had been French. In cases of recapture, no letter of marque from the King is required, to give to the recaptor the benefit of the same salvage to which he would have been entitled if he had been provided with letters of marque (5). The King, however, has the

(1) 5 Rob. Rep. 9.
(2) 43 G. 3. c. 160.
(3) Walton v. Hanbury, 2 Vern. 592.
(4) 5 Rob. Rep. 360.
(5) The Helen, 2 Rob. Rep. 224.

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right of releasing any prize previously to its condemnation. This, said Lord Ellenborough, in the case of Sterling v. Vaughan (1), is an implied exception in the grant of prize by the crown.

The doctrine as to embargoes preceding hostilities, is not peculiar to the British coasts. Its principle has been acknowledged amongst all nations, and forms the basis of the right of reprisals. "*Reprisals,*" says Vattel (2), "are used between nation and nation, in order to do themselves justice, when they cannot otherwise obtain it. If a nation has taken possession of what belongs to another, if she refuses to pay a debt, to repair an injury, or to give adequate satisfaction for it, the latter may seize something belonging to the former, and apply it to her own advantage, till she obtains payment of what is due to her, together with interest and damages; or keep it as a pledge till she has received ample satisfaction. In the latter case, it is rather a stoppage, or a seizure, than reprisals; but they are frequently confounded in common language. The effects thus seized on are preserved while there is any hope of obtaining satisfaction or justice. As soon as that hope disappears, they are confiscated, and then the reprisals are accomplished. If the two nations, upon this ground of quarrel, come to an open rupture, satisfaction is considered as refused from the moment that war is declared, or hostilities commenced; and then also the effects seized may be confiscated."

"In reprisals," continues the same author (3), "we seize on the property of the subject just as we would on that of the state, or sovereign; every thing that belongs to the nation is subject to reprisals, whenever it can be seized, provided it be not a deposit intrusted to the public faith. As it is only in consequence of that confidence which the proprietor has placed in our good faith, that we happen to have such a deposit in our hands, it ought to be respected, even in case of open war; such is the conduct observed in England, and elsewhere, with respect to the money which foreigners have placed in the public funds."

Reprisals thus understood and authorized, are made in two ways, either by embargo, as we have already seen, in which case the act is that of the state, or by letters of marque and reprisals, in which case the act is that of the subject, authorized by the

(1) 11 East. 619.
(2) Vatt. b. 2. ch. 18. s. 342.
(3) Vatt. b. 2. ch. 18. s. 344.

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state's permission. "These words, marque and reprisal," says Mr. Justice Blackstone (1), "are synonymous, and signify a taking in return. They are grantable wheresoever the subjects of one state are injured by those of another, if justice be denied by that state to which the offender belongs. And the effect of the grant is to authorize the seizure of the bodies and goods of the subjects of the offending state, which may be detained till satisfaction be made, but no longer (2)."

"But by the law of nations," says Molloy (3), "letters of marque or reprisal will not authorize the molestation of ambassadors, nor of those who travel for religion; nor of students, scholars, or their books; nor of women or children, by the civil law; nor those that travel through a country, staying but a little while there, for they are only subject to the law of that place. By the canon law, ecclesiastical persons are expressly exempt from reprisals." A merchant of another place than that against which reprisals are granted, albeit the factor of such goods were of that place, is not subject to "reprisals."

Such appears to be at present the law and practice of civilized nations, with respect to hostile property in general found within their dominions at the breaking out of a war. There seems, however, something of subtlety in the distinction between the virtual and the actual declaration of hostilities, and in the device of giving to the actual declaration a retrospective efficacy, in order to cover the defect of the virtual declaration previously implied. The rule of our ancestors was much clearer and broader (4). In early times, at the beginning of a war with another country, merchants belonging to that country, and found within the realm of England, were attached indeed; that is to say, they were not permitted to go abroad. But Magna Charta provides, that this attachment shall be without harm of body or goods, with this limitation, until it be known to the King, or keeper of the realm in the King's absence, how our merchants, in the country at war with us, shall be entreated; and if our merchants be well entreated, then theirs shall be likewise with us. (5)

(1) 1 Bla. Com. ch. 7.

(2) Grot. b. 3. c. 2. Vatt. b. 2. c. 13. 2 Wooddes. 435 to 440.

(3) B. 1. c. 2. s. 18.

(4) See Beawes Lex Merc. 6 Ed. 397. Marten's L. N. 274, 5, 6, 7.

(5) Magna Charta, 2 Inst. 58. 1 Bla. Com 260. Bro. Ab. tit. Property, pl. 38. Skin. 204. Bac. Abr. Mercht. A.

And by the statute 27 Ed. 3. stat. 2. cha. 17. it was enacted, that in case any dispute shall arise between this country and the sovereign of any foreign land, the merchants and others of that land shall not be sent suddenly out of our kingdom and territories, on account of such dispute, until they shall be warned and proclamation published: and that they shall go out of this kingdom and territory with their goods freely, within forty days after such warning or proclamation; and that in the mean time, they shall not be in any thing hindered or disturbed in their passage, or to make profit with their said merchandise, if they wish to sell them; and in default of wind or ship, or in case (from sickness or other evident cause) they cannot go out of this kingdom in so short a time, then they shall have forty other days, or more, if the King think fit, within which time they may pass conveniently with their merchandises, or sell as before. (1)

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But though the law of our ancestors thus appears to have surpassed, in liberality, the institutions of their modern descendants, with regard to hostile property found within this realm in the actual possession of the enemy; yet, with respect to property belonging to the enemy, but not actually reduced into his possession, such as debts which may be due to him, or contracts entered into with him, our law, at this day, pursues a policy of a more liberal character. When Alexander, by conquest, became master of Thebes, he found, among the treasures of the conquered, an engagement from the Thessalians to pay a hundred talents; the Thessalians having served with merit in his army, he gave up the engagement to them, and thus remitted the debt. Vattel (2), after citing this case, observes, that "the sovereign has naturally the same right over what his own subjects may owe to enemies. He may, therefore confiscate debts of this nature, if the term of payment happen in time of war; or at least, he may prohibit his subjects from paying while the war continues." The latter course has been adopted by the British law. We suspend the right of the enemy to the debts which our traders may owe to him, but we do not annul it; we preclude him, during war, from suing to recover his due; for we are not to send treasure abroad for the direct supply of our enemies in their attempts to destroy us; but, with the return of peace, return the right and the remedy. This doctrine of the

Contracts and Chose in Action how affected by War.

(1) Beawes, 38.

(2) Vatt. b. 3. ch. 5. sect. 77

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British law respecting suspension and subsequent restoration of hostile rights and remedies, is evidenced by a great many decisions. We will first consider the case of the Hoop (1), because it comprehends, in one concise view, not only the law of nations respecting the power of withholding payment from an enemy of the debts that may be due to him, but the rule of our own law also, with the exceptions which it admits. "It is a principle of law," says Sir Wm. Scott (2), "that during a state of war, there is a total inability to sustain any contract by an appeal to the tribunals of the one country, on the part of the subjects of the other. In the law of almost every country, the character of an alien enemy carries with it a disability to sue or to sustain, in the language of the Civilians, a persona standi in judicio. The peculiar law of our own country applies this principle with great rigour. The same principle is received in our courts of the law of nations; they are so far British courts, that no man can sue therein who is a subject of the enemy, unless under particular circumstances, that pro hac vice discharge him from the character of an enemy, such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority, that puts him in the king's peace pro hac vice." This short statement sufficiently testifies what is the law on the subject of withholding the debt during war. The following decision (3) will evince, what is the law on the subject of restoring the debt at the return of peace. A petition came on in the Court of Chancery, in the matter of Boussmaker, a bankrupt, praying, that the petitioner might be admitted to prove, under the commission, a debt which the commissioners had refused to admit, upon the objection that the creditors, applying to prove, were alien enemies. The Lord Chancellor explained the distinctions of the law and its principles, on this important question, whether the right of an alien enemy was destroyed or only suspended by war. "If this," said his Lordship (4), "had been a debt arising from a contract entered into with an alien enemy during war, it could not possibly stand, for the contract would be void; but if the two nations were at peace at the date of the contract, though, from the time of war taking place, the creditor could not sue, yet, the contract being originally good, upon the return of peace the right would revive: it would be contrary to justice

(1) 1 Rob. Rep. 196.
(2) 1 Rob. Rep. 200.
(3) Ex parte Boussmaker, 13 Ves. Jun. 71.
(4) 13 Ves. Jun. p. 71, 72.

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therefore to confiscate this dividend. Though the right to recover is suspended, that is no reason why the fund should be divided among the other creditors. The point is of great moment, from the analogy to the case of an action. The policy avoiding contracts with an enemy, is sound and wise; but where the contract was originally good, and the remedy is only suspended, the proposition that therefore the fund should be lost, is very different." According to the strictness of the law of nations, we have already seen, that debts due to alien enemies may be confiscated by the state. But in England, and in some other modern states, a gentler law appears to have been established, a law which, though in no way compulsory with regard to foreign nations, is binding upon the crown in this particular country. An old case indeed, of the Attorney General against Weedon and another (1), seems to countenance the prerogative of the British crown in all the rigour of the old law of nations, but that doctrine is questioned by Rolle, in his Abridgement; and in the case of Furtado v. Rogers (2), Lord Alvanley said, "With respect to the argument, that all contracts made with the enemy enure to the benefit of the King during war, and that he may enforce payment of any debt due to an alien enemy from any of his subjects, we think it is not entitled to much weight. Such a course of proceeding nevér has been adopted, nor is it very probable that it ever will be adopted, as well from the difficulties attending it, as from the disinclination to put in force such a prerogative." In a late case, where persons interested in goods effected an insurance thereon, and a loss took place whilst they were neutral, but afterwards became alien enemies, it was held by Lord Ellenborough, that their remedy on the policy was only suspended, not forfeited; and that, consequently, their inability to sue could not be given in evidence under the general issue, but ought to have been pleaded in abatement (3). But if the loss had happened after the declaration of hostilities, the alien would have been without remedy (4). Generally speaking, a nation does not venture to touch the capitals which the subjects of the enemy may have in its funds, or that it may otherwise owe to such subjects. (5)

(1) Parker's Rep. 207.

(2) 3 Bos. and Pul. 191. And see observations of Gibbs, C. J. in Antoine v. Morshead, 6 Taunt. 239. and the King v. Depardo, 1 Taunt. 29.

(3) Harman v. Kingston, 3 Campb. 152.

(4) Brandon v. Curling, 4 East, 410.

(5) Emerigon, v. 1. p. 567. Marten's L. N. 277.

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Right of Capture out of the Kingdom.

Having thus considered the effect of war upon that portion of commerce belonging to one belligerent, which lies *within* the dominions of the other; we will now proceed to consider the effect of war upon that portion of commerce belonging to one belligerent, which subsists *out of the dominions* of the other. With respect to the commerce thus subsisting abroad, as there are, for the most part, no general ties of faith that confine the common rights of capture, the broad principle is that such commerce is liable, by the acknowledged law of nations, to be seized and appropriated by the adverse belligerent wherever it is found. To this rule the exceptions are only those admitted by the law of nations in favour of *neutral* territory, or which may arise from relaxations *expressly permitted* by one belligerent state to the merchandize of the other. The only exceptions are by the protections, which, on peculiar occasions, the government affords to particular persons or particular adventures, as by passports, letters of safe conduct, and licences. The nature of these will hereafter be fully considered. In some wars, it has been usual to make an exception in favour of small fishing vessels, from tenderness to a poor and industrious order of people; this, however, we have seen, is a matter of forbearance and not of right. (1)

Legal Mode of Seizure by Embargo or Capture as it affects Commerce. (2)

We will now consider the *mode* in which the rights of seizure are usually exercised, and these are by embargo or capture. We have already considered the subject of embargo (3). *Capture*, properly so called, bearing avowedly a warlike complexion, is said to be made (4) where a ship is subdued and taken, either by a pirate or by an enemy, whether in open war or by way of reprisals, and whether with intent to appropriate both ship and cargo, or only certain hostile or contraband goods found on board. Of capture by a pirate, nothing can be said, but that it is illegal by all laws, human and divine: and we will confine our enquiry to the consideration of capture by an enemy. The case of the Jonge Jacobus Baumann (5), is a striking instance of what may, or may not be considered as a capture: the vessel bearing that name was boarded one morning by an officer and several men belonging to the Apollo frigate, then lying stranded and in distress, who told the master, a neutral, that he must go down to the assistance of the frigate. The master

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(1) Young Jacob v. Johanna, 1 Rob. Rep. 19. ante, 267.

(2) See Horne on Captures. Marten's L. N. 287.

(3) Ante, 415, 6, 7.

(4) 2 Marshall on Insurance, 422.

(5) 1 Rob. Rep. 243.

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accordingly went down, and took the whole of the crew on board, to the number of one hundred and seventy or one hundred and eighty men. The ship arrived at Yarmouth three days afterwards, and was navigated, during the passage, by the master himself and his own crew, except that the pilot belonging to the frigate steered through the banks of Yarmouth; on arriving at Yarmouth, the persons who had been thus preserved had the ingratitude to proceed against the ship as a prize, which they alleged themselves to have taken, on a suspicion of her being engaged in a hostile trade. Sir William Scott said, "the owners of the cargo, indeed, had done no service to the English seamen, and that therefore, if the cargo appeared to be hostile, there was no reason against its condemnation: but that the master and owner of the ship had been most materially instrumental in saving one hundred and seventy or one hundred and eighty British officers and men to their country, and therefore were entitled to be liberally considered by those who had received this benefit;" and he added these words (1): "If the ship had really belonged to an enemy, in my opinion the character of enemy itself must have been blotted out and obliterated by such a service as this. If I was compelled to condemn this ship, it would be a most reluctant condemnation indeed. I hope and trust that, if the circumstances are true as stated by the master, a condemnation of the vessel would be the very last thing to present itself to the expectation of the asserted captors."

In case of a conquest by capitulation, property at sea does not seem to be in precisely the same predicament as property upon land. For, from the case of the ships taken at Genoa (2), it appears that a permission to the conquered of withdrawing themselves, their money, merchandizes, moveables, or effects, by sea or land, does not necessarily nor usually imply a permission to withdraw property afloat. The permission means, that they may withdraw, either by sea or by land, the property which it is lawful for them to withdraw, but does not defeat the usual custom, that property at sea cannot be withdrawn at all. And from the same case it further appears, that though one of the articles of a capitulation expressly grant the freedom of trade, still the capitulation shall not be understood to protect property afloat; a distinction having been usually taken by the com-

(1) 1 Rob. Rep. 245. (2) 4 Rob. Rep. 388.

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manders of fortunate expeditions between this property and property at land: and Sir William Scott said, in his judgment, "It is in every day's practice to seize all property afloat, and yet to allow a general freedom of trade exclusive of such particular seizure."

When the capture is made previously to the formal declaration of hostilities, and not in open war, it is made under letters of marque and reprisal. The nature of these has been already explained, where the right of a state to seize the property of her rival, found within her dominions, was considered; and there is no distinction between the reprisals upon property within her dominions, and reprisals upon property without (1). When, by any of the lawful means which have been enumerated, a belligerent had possessed himself of property belonging to his enemy, it was formerly the custom, among almost all nations, to redeem it from his hands by ransom. But ransom from the hands of an enemy is now little known to the commercial law of England: for, by the statute 22 Geo. 3. c. 25. the ransom of any ships, or merchandises on board the same, belonging to any subject of this country, and taken by the subjects at war of any state at war with his Majesty, or by any person committing hostilities against his Majesty's subjects, is absolutely prohibited: and by the statutes of 43 Geo. 3. c. 160. and of the 45 Geo. 3. c. 72. (2), such ransom is again prohibited, unless in the case of extreme necessity, to be allowed by the Court of Admiralty. And all contracts for ransom contrary to these statutes, are made void, and subjected to a penalty of five hundred pounds. (3)

Of Rescue and Recapture. (4)

Having considered the cases in which the right of the captor takes effect, and invests him with the benefit of his capture, we will now examine the cases when he may be legally deprived of that benefit by *rescue* or *recapture*. Rescue and recapture are distinguishable from each other. The term recapture is ordinarily employed when a prize, having been captured by an enemy, is recovered from his possession by the arrival of a friendly force. The term rescue more usually denotes that recovery which is effected by the rising of the captured party himself against his captor. There is, however, another kind of rescue, which par-

(1) Ante, 418.

(2) Marshall on Insurance, 431, 2.

(3) Marshall on Insurance, 431.

(4) Marten's L. N. 290.

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takes of the nature of recapture: it occurs where the weaker party, before he is overpowered, obtains relief from the arrival of fresh succours, and is thus preserved from the force of the enemy. From the case of the Helen (1), though that case indeed turned upon the duty of recapture, it may fairly be inferred, that it is also a duty among fellow-subjects, and equally incumbent of course upon allies, to attempt the rescue of one another from the enemy, wherever there appears to be any reasonable prospect of success. But as to the other kind of rescue, that which is effected by the rising of the captured to defeat their captor, this is a matter rather of merit than of duty. In the case of the Two Friends (2), Sir William Scott said, " Seamen are not bound by their general duty, as mariners, to attempt a rescue; nor would they have been guilty of a desertion of their duty in that capacity if they had declined it. It is a meritorious act to join in such attempts; and if there are persons who entertain any doubt whether it ought to be so regarded, I desire not to be considered as one of that number. As to the situation and character of persons engaged in such attempts, it is certainly to be regarded an act perfectly voluntary, in which each individual is a volunteer, and is not acting as a part of the crew of the ship, or in discharge of any official duty, either ordinary or extraordinary." The distinction between the obligation to the performance of the two kinds of rescue, appears to be perfectly reasonable. If it were the bounden duty of the conquered to rise against their conquerors, their original surrender would have been a nugatory act, availing them absolutely nothing; the presumption is always, that a surrender does not take place till conquest and even escape are hopeless; and under such circumstances, it is but reasonable, that each man be allowed to judge for himself of the opportunities that may justify a subsequent insurrection. But the case is otherwise with a newly arriving force: they are bound to attempt the rescue of their friends. Their strength is fresh and untried, and unless there be a clear superiority against them, it seems but just that they should brave the risk of a contest. Nor is a letter of marque, nor any other commission of the state, required by the law of nations, in order to subject a newly arriving force to the duties of rescue and recapture (3).

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(1) 3 Rob. Rep. 224.; and also the Two Friends, 1 Rob. Rep. 271.

(2) 1 Rob. Rep. 271. As to interference of a passenger on board a ship, see Newman v. Walters, 3 Bos. and Pul. 616.

(3) The Helen, 3 Rob. Rep. 224.

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Postliminium, or the Return of Property to the original Owner on Recapture.(1)

Out of the questions of rescue and recapture arises the consideration of postliminium and salvage. "The right of *postliminium*," says Vattel (2), "is that in virtue of which persons and things, taken by the enemy, are restored to their former state on coming again into the power of the nation to which they belonged. When persons or things captured by the enemy are retaken by our allies or auxiliaries, or in any other manner fall into their hands, this, so far as relates to the effect of the right, is precisely the same thing as if they were come again into our power: since, in the cause in which we are jointly embarked, our power and that of the allies is but one and the same." So that when possessions, taken by the enemy, are either recaptured or rescued from him by the fellow-subjects or allies of the original owner, they do not become the property of the recaptor or rescuer, as if they had been a new prize; but are restored to the possession of the original owners, by what is called the right of postliminium, or jus postliminii, upon certain conditions which we shall presently have occasion to consider. But (3) the right of postliminium does not take effect in neutral countries: for when a nation chooses to remain neuter in war, she is bound to consider it as equally just on both sides, so far as relates to its effects; and consequently, to look upon every capture made by either party as a lawful acquisition. To allow one of the parties, in prejudice to the other, to enjoy in her dominions the right of claiming things taken by the latter, or the right of postliminium, would be declaring in favour of the former, and departing from the line of neutrality. Moveables, however, are not entitled to the full benefit of postliminium. Lands, houses, and other fixed possessions, are easily identified, and therefore are completely within the right: and the reason for the exception of moveables is, that in general the identification of them is impracticable, and the original owners are therefore presumed to have given them up as lost. However, even moveables are restored to the original owners, if retaken from the enemy immediately after his capture of them: in which case the proprietor neither finds a difficulty in recognizing his effects, nor is presumed to have relinquished them. This is the general law of nations with regard to the effect of the right of postliminium upon moveables; but particular nations, as we shall presently see, have relaxed the rigour of that rule in regard to their own subjects, and (by mutual consent) in regard to the

(1) Marten's L. N. 290 to 293. (3) Vattel. b. 3. c. 14. s. 208.
(2) Lib. 3. c. 14. s. 204.

subjects of one another. "Prisoners (1) of war who have given their parole, territories and towns which have submitted to the enemy, and have sworn or promised allegiance to him, cannot of themselves return to their former condition by the right of postliminium; for faith is to be kept even with enemies. But if the sovereign retake those towns, countries, or prisoners, who had surrendered to the enemy, he recovers all his former rights over them, and is bound to re-establish them in their pristine condition."

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But it is not so with countries or persons taken by a belligerent state, who were not the subjects of that state during any preceding part of the same war. For the law of postliminium implies that the party claiming it returns to his previous character: and he who, during the whole war, has been the subject of the enemy alone, must be considered, when he falls into the hands of the rival state, not as returning to a previous character, but as acquiring a character absolutely new. Upon this principle was decided an important question in the case of the Boedus Lust. (2)

We will now inquire what rights of postliminium attach upon property which has been alienated by the enemy. Here we must attend to the distinction before laid down, between *immoveable* property, which is recoverable by the rights of postliminium, and things moveable, to which that right does not, by the law of nations, extend. "Let it be remembered," says Vattel (3), "as to immoveables, that the acquisition of a town, taken in war, is not fully consummated till confirmed by a treaty of peace, or by the entire submission or destruction of the state to which it belonged. Till then the sovereign of that town has hopes of retaking it, or of recovering it by a peace: and from the moment it returns into his power, he restores it to all its rights, and consequently it recovers all its possessions, as far as in their nature they are recoverable. It therefore resumes its immoveable possessions from the hands of those persons who have been so prematurely forward to purchase them. In buying them of one who had not an absolute right to dispose of them, the purchasers made a hazardous bargain; and if they prove losers by the transaction, it is a consequence to which they deliberately

(1) Vattel. b. 3. c. 14. s. 210, 211.

(2) 5 Rob. Rep. 233.

(3) Vattel. b. 3. ch. 14. s. 212. Marten's L. N. 290, 1, 2.

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exposed themselves. But if that town had been ceded to the enemy by the treaty of peace, or was completely fallen into his power by the submission of the whole state, she has no longer any claim to the right of postliminium; and the alienation of any of her possessions by the conqueror, is valid and irreversible; nor can she lay claim to them, if, in the sequel, some fortunate revolution should liberate her from the yoke of the conqueror."

As to things *moveable*, we find from the same section that the law is otherwise. And this, indeed, is of course: for, as moveable property, according to the law of nations, is held to be irrecoverable by the original owner, in virtue of any postliminium, when once it has passed by a *land* war into the complete possession of the enemy twenty-four hours, much more is such property to be protected from the effect of postliminium, when it has not only passed into the complete possession of the enemy, but been by him transferred bonâ fide to a neutral (1). To this may be added (2), that "as things not mentioned in the treaty of peace remain in the same condition in which they happen to be at the time when the treaty is concluded, and are on both sides tacitly ceded to the present possessor, it may be said, in general, that the right of postliminium no longer exists after the conclusion of the peace. That right entirely relates to the state of war."

Though the law of nations in general most clearly establishes that the right of postliminium, with respect to moveables, is extinguished, as soon as those moveables are completely reduced into the possession of the enemy, and that they then may be immediately alienated to neutrals as indefeasible property, yet there has been a considerable difference of opinion and of practice as to the question, what shall be deemed to constitute this complete possession. Some writers on the law of nations have stated it to be merely requisite that the property shall have been twenty-four hours in the enemy's power; others, that the property must have been brought infra præsidia, that is, within the camps, towns, ports, or fleets of the enemy; and others have drawn other lines of an arbitrary nature (3). Of late years, however, a more absolute species of possession seems to

(1) 2 Woodde's. p. 441. sect. 34. Marten's L. N. 292.
(2) Vatt. b. 3. ch. 14. s. 216.
(3) Marten's L. N. 290, 1.

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have been required, at least as far as respects a maritime capture (1). "I apprehend," said Sir William Scott, in the case of the Flad Oyen (2), "that by the general practice of the law of nations, a sentence of condemnation is at present deemed generally necessary; and that a neutral purchaser in Europe, during war, does look to the legal sentence of condemnation as one of the title-deeds of the ship, if he buys a prize-vessel. I believe there is no instance in which a man, having purchased a prize-vessel of a belligerent, has thought himself quite secure in making that purchase, merely because that ship had been in the enemy's possession twenty-four hours, or carried infra præsidia." At any rate, the rule of condemnation is the general rule applied by England. In our Courts of Admiralty it has always been holden that the property is not changed in favour of a vendee or recaptor, so as to bar the original owner, till there has been a regular sentence of condemnation (3); and in the reign of King Charles the Second, a solemn judgment was given upon this point, and restitution of a ship taken by a privateer was decreed, after she had been fourteen weeks in the enemy's possession, because she had not been condemned; and this judgment of the Court of Admiralty was cited by Lord Mansfield in the case of Goss and Withers (4); and the courts of common law have enforced the same rule, as will be seen from the case of Assievedo against Cambridge (5), where it was holden that four years possession, and several voyages performed, will not change the property without a sentence of condemnation; and this condemnation must be pronounced by a court of competent jurisdiction, in the country either of the enemy himself, or of some of his allies, and not in a neutral country. But if, after the time of the enemy's transferring his prize to a neutral, a peace be concluded between that enemy and the state from whose subject the prize was taken; then the transfer to the neutral becomes valid, even though there was no legal condemnation. For, as we have already seen from Vattel, the right of postliminium no longer exists after the conclusion of peace. And therefore, in the case of the schooner Sophie (6),

(1) Marten's L. N. 292.
(2) 1 Rob. Rep. 134.
(3) Vid. et 3 Rob. Rep. 236, 7, 8.
(4) Goss and Withers, 2 Burr. 683. See also the case of the Constant Mary, reported in a note to the case of the Kierlighett, 3 Rob. Rep. 97.
(5) Assievedo against Cambridge, 10 Mod. 79. See also 3 Rob. Rep. 237, 8.
(6) 6 Rob. Rep. 142.

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the British Court of Admiralty decided, that a ship which had been sold to a neutral, after an illegal condemnation by a prize tribunal, and which therefore, would not have been considered as fairly transferred during war, was to be deemed, by the intervention of peace, a legitimate possession in the neutral's hands, and cured of all defects in the title. For as the title of the enemy captor himself, would have been quieted by the intervention of peace, so it was thought to be but reasonable that the general amnesty should have the same effect upon property in the hands of those to whom that enemy might have assigned it. "Otherwise," observed Sir William Scott, "it could not be said that the intervention of peace would have the effect of quieting the possession of the enemy; because, if the neutral possessor was to be dispossessed, he would have a right to resort back to the belligerent seller, and demand compensation from him; and as to a renewal of war, though that may change the relation of those who are parties to it, it can have no effect on neutral purchasers, who stand in the same situation as before."

When the assignment has been made by the hostile captor regularly and bonâ fide, and the party to whom the captor has so made that assignment was, at the time of making it, a neutral, the title in the hands of such assignee will not be defeated by his subsequently becoming an enemy, as appears from the case of the Purissima Conception (1). But though, in such instances, the rights of rescue and recapture are gone, so that the original owner has irrecoverably lost his property, yet the party to whom it was transferred during neutrality having become hostile, his property is of course, in common with all other hostile possessions, liable to be seized as prize of war; the only difference being that, instead of passing as a recapture and reverting to the original owner, it is considered as a new booty, and belongs either to those who make the seizure or to the state, according to the circumstances of the case.

The rules which have been stated, are those which govern the right of postliminium by the general law of nations, and to which therefore England is obliged in common justice to conform, where the interests of neutrals are concerned. But in cases arising among her own subjects with one another, and in cases arising between her own subjects and those of her allies, peculiar

(1) 6 Rob. Rep. 45.

modifications of the principle have been introduced or acknowledged by her. Thus it has been established by several acts of parliament (1), that, among English subjects, the maritime right of postliminium subsists even to the end of the war; and therefore the ships or goods of the subjects of this country, taken at sea by an enemy, and afterwards retaken, at any indefinite period of time, and whether before or after sentence of condemnation, are to be restored to the original proprietors. The statute of the 43 Geo. 3. c. 160. s. 39. makes an exception as to ships which have been set forth by the enemy as vessels of war, enacting that these shall not be restored to the original owners, but belong wholly to the recaptors. But if the property recaptured were captured at first in an illegal trade, then the original right is divested, and the previous owner will not be admitted to restitution from the recaptors, as was determined in the case of the Walsingham Packet (2). The rule which this country adopts in giving effect to the right of postliminium between her own subjects and those of her allies, may be gathered from the judgment pronounced by Sir W. Scott in the case of the Santa Cruz (3). It was the case of a Portuguese vessel taken by the French; and after remaining a month in the enemy's possession, retaken by the cruizers of this country, which was in alliance with Portugal. " The actual rule of the English maritime law," said Sir W. Scott, " I understand to be clearly this, that the maritime law of England, having adopted a most liberal rule of restitution with respect to the recaptured property of its own subjects, gives the benefit of that rule to its allies, till it appears that they act towards British property on a less liberal principle. In such a case it adopts their rule, and treats them according to their own measure of justice." It appears from the case of the San Francisco (4) that, by a treaty between this country and Spain, the vessels of the respective countries, which have been recaptured, are to be restored on payment of salvage.

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But though it has been the rule of this country, as among her own subjects, to restore recaptured property to the original owner, yet it has not been her rule to make the recaptors afford this restitution altogether gratuitously. By the acts of the

Of Salvage or Remuneration to Recaptor.

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(1) 13 Geo. 2. ch. 4. 17 Geo. 2. ch. 34. 19 Geo. 2. ch. 34. 43 Geo. 3. ch. 160. Vide 2 Burr. 1198. and 1 Bl. Rep. 27. Hamilton v. Mendes.

(2) 2 Rob. Rep. 77.

(3) 1 Rob. Rep. 49.

(4) 1 Edwards, 279.

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43 Geo. 3. c. 160. s. 39. the legislature has secured to the recaptors, according to the circumstances of the recapture, certain rates of salvage: which salvage is, as the term indeed implies, a reward given for saving the property, or (which is nearly the same thing) recovering it. The salvage allotted to British recaptors, is at the rate of one-eighth of the beneficial interest in the whole recaptured property, where the recapture is effected by ships belonging to the royal navy; and one-sixth, where it is effected by private ships; the judge of the court being at liberty, in cases of recapture by the joint efforts of king's ships and private vessels, to order such salvage as he shall deem reasonable. In our old books, the word salvage is used in another sense, being made to denote the goods saved or recovered; but at present it almost universally bears this sense, namely, the reward to which the deliverer of such goods becomes entitled for the service he has performed. The reward of salvage is not confined to recapture alone, it is given also in cases of rescue. But here it is necessary to advert again to that distinction which was before pointed out, between the two kinds of rescue. When the rescue is effected by the arrival of a fresh succour, which relieves the weaker party before he falls into the power of the adversary, no salvage is given to the rescuers. Thus it was said by Sir William Scott, in the case of the Franklin (1), " No case has been cited, and I know of none, in which military salvage has been given, where the property rescued was not in the possession of the enemy, or so nearly as to be certainly and inevitably under his grasp. There has been no case of salvage where the possession, if not absolute, was not almost indefeasible, as where the ship had struck, and was so near as to be virtually in the hands and gripe of the enemy." When the rescue is of the other description, that is to say, when it is effected by the rising of the captured crew against the captors, a salvage is given; as is manifest from very many cases in the Admiralty Reports, and most particularly from that of the Two Friends (2). The allotment of salvage, on recapture and rescue, is not a matter of British regulation alone; for salvage, as the court remarked in the case last quoted, is a question of the law of nations. The particular rates indeed which our acts of parliament assign, are binding only in cases between British subjects (3); but in cases where restitution has been made to the subjects of other states,

(1) 4 Rob. Rep. 147. 1 Edw. Rep. 68.

(2) 1 Rob. Rep. 271.

(3) Two Friends, 1 Rob. Rep. 271.

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it has been usual, with our courts, to assess such a salvage as the nature of the service performed might reasonably appear to deserve (1); and that assessment is usually though not necessarily made according to the British rates. This was stated by Sir William Scott, in the case of the Two Friends. Nor is there any thing unjust in this requisition of salvage from neutrals upon restitution; the restitution of moveables being, as we have seen, a matter of favour and relaxation, not enjoined in any way by the strict law of nations, we of course have a right to annex a condition to our liberality. And after all, as Lord Mansfield observed in the case of Cornu against Blackburn (2), there is no exaction in the case; for no man can be compelled to pay salvage, unless he chooses to have the property back.

If the property of a nation, not engaged in hostility with the enemies of this country, happen to be taken as prize by them, and retaken out of their hands by his majesty's subjects, the probability of its condemnation in the courts of the country of the captors is to be considered; and unless there appear to be ground on which it may be supposed that it would have been condemned in those courts, it is to be restored without the payment of any salvage. In the late war, the conduct of the cruizers and prize courts of France, having given reason to apprehend that neutral property, arrested by the former on the high seas, would, in almost all cases, be condemned by the latter, salvage was usually allowed to the recaptors of neutral property out of the hands of the French by our Court of Admiralty, and such allowance was not thought unreasonable by the neutral merchants. But this was treated as an exception to the general rule, founded on particular circumstances (3).

(1) Marshall, 474.

(2) Dougl. 648.

(3) Eleonora Catherina, 4 Rob. Rep. 156. War-Onshen, 2 Rob. Rep. 299. Carlotta, 5 Rob. Rep. 54. Huntress, 6 Rob. Rep. 104. Abbot's Law of Shipping, part 3. c. 11. s. 13.

CHAP. IX.

How Neutrals Commerce and Contracts may be legally affected by War.

HAVING thus endeavoured to consider the effect of war on the commerce of *Belligerents*, we will now proceed to examine the second division of the subject, relating to the legal effect of war upon the commerce of *Neutrals*. (1) This will lead us to consider—The right of neutrals to carry on their accustomed commerce—The protection afforded to commerce by a neutral port or country—What commerce of neutrals, during war, is illegal or contraband—The consequences of violation of blockade, or of affording illegal assistance to the enemy by conveying dispatches, carrying troops, or trading contrary to treaty; and also the consequences of undue submission by a neutral to the outrages of one of the belligerents; and of carrying on commerce usually interdicted in time of peace, as the coasting and colonial trade—What interest of the enemy in property, upon which a neutral has a claim, renders it liable to confiscation—And lastly, of the suspension of the rights of neutrals, the right forcibly to employ their ships, and of visitation and search, and consequences of resistance.

Right of Neutrals to carry on their accustomed Commerce. (2)

To mitigate, as much as possible, the calamities and sufferings of warfare, and to confine them to the belligerent powers, nations have found it convenient mutually to adopt certain principles, which, like the common law of our own country, have become fixed and settled by usage, confirmed by precedents, and illustrated by the writings of learned men. These principles have also been adverted to and ratified by treaties between civilized nations in all ages; and this public law establishes, that countries not engaged in war, nor interposing in it, shall not be affected by the differences of contending nations; but, to use the very words of the eminent judge who now presides with so much learning in the Court of Admiralty, " upon the breaking out of

(1) See division of the subject ante.

(2) See Horne on Captures, 215 to 233.

war, it is the right of neutrals to carry on their accustomed trade, with an exception of the particular cases of a trade to blockaded places, or in contraband articles, and of their ships being liable to visitation and search (1). It has even been holden, that a British-born subject, domiciled in a neutral country, may legally trade from that country with a state at war with this country. (2)

Every maritime war in Europe, since civilization gradually made the benefits of commerce appreciated, has produced discussions about the rights of those nations that remained at peace. In some instances their commerce certainly suffered; but where their rights were supported, the balance of advantages was greatly in their favour. The belligerents themselves found a mutual benefit in the exchange of their own produce, which could only be effected by neutral carriers. The intercourse with their colonies was enlarged by all, but principally by the weaker party; and though the varying opinions of the belligerents of the comparative advantages they derived from this intercourse, produced occasional interruptions, neutrals still maintained their rights, partly from the power they were able to throw into one scale or the other, but principally by the general advantages which were recognized by all. Though, however, power and advantage were the real foundation of this practice, the variety of interests, and the constant changes in them, produced the necessity of some unvarying tribunal; for this purpose, the opinions of a few wise men, for want of better means, were erected into a code of international law; and though the contradictions and fanciful extravagances of some of their opinions still leave great room for arbitrary interpretations, something was gained towards permanency and justice, by the admission of these authorities. (3)

In the case of Barker v. Blakes (4), where a neutral ship, trading to a hostile port, had been detained for the purpose of search, and thereby lost her voyage, the underwriters being called upon to indemnify the neutral owner, attempted to set aside his claim, on the ground, that a neutral could not, in a British court, recover an indemnity for losses incurred in a trade

(1) De Tastet v. Taylor, 4 Taunt. 238. Bell v. Reid. 1 M. & S. 727. & Lord Esrkine's Speech, 8th of March, 1808, upon the Orders in Council, 10 Cobbett's Parl. Deb. 935.

(2) Bell v. Reid, 1 M. & S. 727. ante.

(3) Baring on the Orders in Council, 30, 1.

(4) 9 East, 283.

which he had carried on with the enemies of Britain, in contravention of her interests and policy. But the right of the neutral to carry on such a trade, was vindicated and clearly established by Lord Ellenborough, who decided, not only that a neutral has a right to pursue his general commerce with the enemy, but that he has a right even to act as the carrier of the enemy's goods from his own to the enemy's country, without being subject to any confiscation of the ship, or of the neutral articles which may be on board, though certainly not without the risk of having his voyage interrupted by the seizure of hostile property.

Property of Neutrals in an Enemy's Ship protected.

As on the one hand, a neutral has a free and just right to carry the property of enemies in his own vessels; so, on the other, his own property is inviolable, though it be found in the vessels of enemies (1). "It is to be restored to the owners," says Vattel (2), "though without any allowance for detention, decay, &c. The loss sustained by the neutrals, on this occasion, is an accident to which they expose themselves by embarking their property in an enemy's ship; and the captor, in exercising the rights of war, is not responsible for the accidents which may thence result, any more than if his cannon kills a neutral passenger who happens unfortunately to be on board an enemy's vessel (3)."

The law, on this subject, does not appear to have been always so distinctly understood; and it was an old saying, mentioned by Grotius (4), "that goods found in our enemies' ships are reputed theirs." But the sense of the maxim amounts only to this, that it is commonly presumed in such case, that the whole belongs to one and the same master; a presumption, however, which, by evident proofs to the contrary, may be taken off; and so it was formerly adjudged in Holland, in a full assembly of the sovereign court, during the war with the Hanse Towns, in the year 1338, and from thence hath passed into a law. At present, the law is so completely settled, that if a neutral, in partnership with any other trader, engage in a trade which, to that partner, is illegal, yet the share of the neutral is not affected by the illegality of such partner's trade. This may be collected

(1) See Marshal, b. 1. chap. 8. sect. 5., where he cites the Consolato del Mare, and Bynkershock.

(2) Vatt. b. 3. ch. 7. s. 116.

(3) Marshall b. 1. ch. 8. s. 5.

(4) Lib. 3. ch. 6. s. 6.

from the case of the Franklin (1), which was a case of a partnership between Mr. John Bell, residing in America, a neutral country, and Mr. William Bell, residing in England, a belligerent country. The partnership appeared to have carried on a trade in tobacco with the enemy; a trade which, to Mr. John Bell, as a neutral, residing in a neutral country, was perfectly lawful, but which, to Mr. William Bell, residing in a belligerent country, and therefore invested, as we have seen (2), with the national character of a belligerent, was of course illegal, as all trade with the enemy has previously been shown to be, according to the laws of all nations. The tobacco was seized; the share of Mr. William Bell was condemned; but that of Mr. John Bell, who retained his neutral character, was saved harmless. But if the neutral voluntarily constitute himself agent of the belligerent, and make use of false papers, his share in the cargo will also become liable to condemnation. (3)

Protection afforded by a Neutral Port.

Nor does the general inviolability of the neutral character extend solely to the protection of neutral property; in some instances it goes even further, and protects the property of belligerents themselves. Thus "it is unlawful," says Vattel (4), "to attack an enemy in a neutral country, or to commit in it any other act of hostility. The Dutch East India fleet having put to Bergen, in Norway, in 1666, to avoid the English, the British admiral had the temerity to attack them there, but the governor of Bergen fired on the assailants; and the court of Denmark complained, though perhaps too faintly, of an attempt so injurious to her rights and dignity. At present the whole space of the sea, within cannon shot of the coast, is considered as making a part of the territory; and, for that reason, a vessel taken under the cannon of a neutral fortress, is not a lawful prize (5)."

Professor Martens, in his summary of the Law of Nations (6), enforces the same doctrine, and adds, in a note, that "when two vessels, the enemies of each other, meet in a neutral port, or when one pursues the other into such port, not only must they

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(1) 6 Rob. Rep. 127.; see also the case of Zulema, 1 Acton Rep. 14.

(2) Ante, 32 to 54.

(3) The Zulema, 1 Acton Rep. 14.

(4) Vatt. b. 3. ch. 7. sect. 132.

(5) Vatt. b. 1. ch. 23. s. 289.

(6) Mart. b. 8. ch. 6. sect. 6.; vid. et 1 Molloy, b. 1. c. 3. s. 7.; and c. 1. s. 16. ante.

refrain from all hostilities while they remain there, but, should one set sail, the other must not set sail in less than twenty-fou hours afterwards."

Some important cases have been tried in the British Court of Admiralty in which the immunity of neutral domain has been strenuously and most ably enforced by the learned judge who presides there. Such were the cases of the Twee Gebroeders (1), and of the Anna (2), in the latter of which, Sir William Scott observed, "captors must understand, that they are not to station themselves in the mouth of a neutral river, for the purpose of exercising the rights of war from that river; much less in the very river itself. They are not to be standing on and off, overhauling vessels in their course down the river, and making the river as much subservient to the purposes of war, as if it had been a river of their own country." But the principal decision is the Twee Gebroeders (3). In that case, boats had been sent out from L'Espiegle, a British ship, which was itself lying in the Eastern Eems, within the protection of the neutral territory of Prussia, to capture the vessel called the Twee Gebroeders, with three others, which were all lying a little way out at sea. A claim was given in against the captors by the Prussian consul, in consequence of the violation of his country's neutrality. In that case, Sir William Scott said, "It is said, that the ship was, in all respects, observant of the peace of the neutral territory; that nothing was done by her, which could affect the right of territory, or from which any inconvenience could arise to the country, within whose limits she was lying; in as much as the hostile force which she employed, was applied to the captured vessel lying out of the territory. But that is a doctrine that goes a great deal too far; I am of opinion, that no use of a neutral territory for the purposes of war, is to be permitted, I do not say remote uses, such as procuring provisions and refreshments, and acts of that nature, which the law of nations universally tolerates; but, that no proximate acts of war are, in any manner, to be allowed to originate on neutral grounds: and I cannot but think, that such an act as this, that a ship should station herself on neutral territory, and send out her boats on hostile enterprises, is an act of hostility much too immediate to be permitted. For supposing, that even a direct hostile use should be required to bring

(1) 3 Rob. Rep. 336.
(2) 5 Rob. Rep. 373.
(3) 3 Rob. Rep. 162.

it within the prohibition of the law of nations, nobody will say, that the very act of sending out boats to effect a capture, is not itself an act directly hostile, not complete, indeed, but inchoate and clothed with all the characters of hostility. If this could be defended, it might as well be said, that a ship, lying in a neutral station, might fire shot on a vessel lying out of the neutral territory; the injury, in that case, would not be consummated, nor received on neutral grounds, but no one would say, that such an act would not be an hostile act immediately commenced within the neutral territory. And what does it signify to the nature of the act, considered for the present purpose, whether I send out a cannon shot, which shall compel the submission of a vessel lying at two miles distance, or whether I send out a boat, armed and manned, to effect the very same thing at the same distance? It is, in both cases, the direct act of the vessel lying in neutral ground. The act of hostility actually begins, in the latter case, with the launching, and manning, and arming the boat, that is sent out on such an errand of force.

" If it were necessary, therefore, to prove, that a direct and immediate act of hostility had been committed, I should be disposed to hold, that it was sufficiently made out by the facts of this case. But direct hostility appears not to be necessary; for whatever has an immediate connection with it is forbidden. You cannot, without leave, carry prisoners or booty into a neutral territory, there to be detained: because such an act is an immediate continuation of hostility. In the same manner an act of hostility is not to take its commencement on neutral ground. It is not sufficient to say, it is not completed there; you are not to take any measure there, that shall lead to immediate violence; you are not to avail yourself of a station in neutral territory, making, as it were, a vantage ground of the neutral country, a country which is to carry itself with perfect equality between both belligerents, giving neither the one or the other any advantage. Many instances have occurred, in which such an irregular use of a neutral country has been warmly resented; and some during the present war. The practice which has been tolerated in the northern states of Europe, of permitting French privateers to make stations of their ports, and to sally out to capture British vessels in that neighbourhood, is of that number: and yet, even that practice, unfriendly and noxious as it is, is less than that complained of in the present instance: for here, the ship, without sallying out at all, is to commit the hostile act. Every go-

vernment is perfectly justified in interposing to discourage the commencement of such a practice; for the inconvenience, to which the neutral territory will be exposed, is obvious. If the respect due to it is violated by one party, it will soon provoke a similar treatment from the other also, till, instead of neutral ground, it will soon become the theatre of war."

Neutral Ship no Immunity for Enemy's Goods.

But the immunity which neutral territory imparts, is not imparted by neutral ships; for an enemy's goods may be regularly captured on board a neutral ship, as in any other situation. Thus Vattel (1) lays it shortly down, that "if we find an enemy's effects on board a neutral ship, we seize them by the rights of war: but we are naturally bound to pay the freight to the master of the vessel, who is not to suffer by such seizure." But this freight is not, in all cases, to be measured by the charter-party (2). But particular states have sometimes relaxed the rigour of the rule, and granted, by treaty, a privilege of immunity to all goods found sailing in each other's ships, to whomsoever such goods may belong: the maxim in such cases being "Free ships, free goods." Such a privilege was granted by this country to Portugal in the treaty of 1654. (3)

Illegal Commerce of Neutrals.

These are the immunities which may be legally afforded by neutrals to the subjects of one belligerent nation against the hostility of the other. We will now proceed to those instances where neutrals, so far from affording immunity to the commerce of strangers, forfeit, by misconduct, even that immunity which would otherwise belong to their own. This misconduct is of various kinds. We will first speak of the cases where neutrals are found engaged in contraband commerce. (4)

Contraband Commerce.

What commerce shall be deemed contraband is a question which has given rise to various discussions, between the forces of belligerent states, and the merchants of neutral nations. "The catalogue of contrabands," said Sir William Scott, in the case of the Jonge Margaretha (5), "has varied very much, and sometimes in such a manner as to make it very difficult to assign the reason of the variations; owing to particular circumstances, the history of which has not accompanied the history of

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(1) Vatt. b. 3. ch. 7. s. 115.
(2) 1 Moll. 1. 18. Twilling Riget, 5 Rob. Rep. 82.
(3) 5 Rob. Rep. 52. 6 Rob. Rep. 24. 41. 358.
(4) See Acton's Rep. 25.
(5) 1 Rob. Rep. 189.

the decisions." The King having, by his prerogative, the power to promulgate who are his enemies, is bound to watch over the safety of the state; he may, therefore, make new declarations of contraband, when articles come into use as implements of war which were before innocent; this is not the exercise of discretion over contraband; the law of nations prohibits contraband, and it is the usus bellici, which shifting from time to time, make the law shift with them (1). Thus much, at least, is acknowledged on all hands, as Vattel (2) has laid it down, that commodities particularly useful in war are contraband, such as arms, ammunition, horses, timber for ship-building, and every kind of naval stores. But torse and Cordilla hemp, found unfit for naval service, have been held not to be contraband. The greatest difficulty seems to have occurred in the instance of provisions: which have not been held universally contraband, though Vattel (3) admits that they become so on certain occasions, when there is an expectation of reducing the enemy by famine. In modern times, one of the principal criteria adopted by the courts for the decision of the question, whether any particular cargo of provisions be confiscable as contraband, is to examine whether those provisions be in a rude or in a manufactured state. For all articles, in such examinations, are treated with greater indulgence in their native condition, than when they are wrought up for the convenience of the enemy's immediate consumption. "Thus," said Sir Wm. Scott, in the case of the Jonge Margaretha (4), "iron unwrought is treated with indulgence, though anchors and other instruments fabricated out of it, are directly contraband. Hemp is more favourably considered than cordage: and wheat is not considered so obnoxious a commodity, as any of the final preparations of it for human use."

But these differences of opinion, with respect to the nature of provisions, appear to have arisen, rather from individual carelessness or misapprehension, than from any radical confusion in the law of nations on this subject. That they are, in strictness, confiscable as contraband, appears to be undeniable. In the case of the Haabet (5), Sir William Scott explained the strict law, and the relaxations of modern practice, in the following words: "The right of taking possession of cargoes of this de-

(1) Lord Erskine's Speech 8th March, 1808, on the Orders in Council, 10 Cobbett's Parl. Deb. 958, 9.

(2) Vatt. b. 3. ch. 7. sect. 112.

(3) Vatt. b. 3. ch. 7. sect. 112.

(4) 1 Rob. Rep. 189.

(5) 2 Rob. Rep. 182.

scription, commeatus, or provisions, going to the enemy's ports, is no peculiar claim of this country; it belongs generally to belligerent nations. The ancient practice of Europe, or at least of several maritime states of Europe, was to confiscate them entirely. A century has not elapsed since this claim has been asserted by some of them; a more mitigated practice has prevailed in later times, of holding such cargoes subject only to a right of pre-emption; that is, to a right of purchase, upon a reasonable compensation to the individual whose property is thus diverted. I have never understood that, on the side of the belligerent, this claim goes beyond the case of cargoes avowedly bound to the enemy's ports, or suspected, on just grounds, to have a concealed destination of that kind; or that, on the side of the neutral, the same exact compensation is to be expected, which he might have demanded from the enemy in his own port. The enemy may be distressed by famine, and may be driven by his necessities to pay a famine price for the commodity, if it gets there: it does not follow that, acting upon my rights of war in intercepting such supplies, I am under the obligation of paying that price of distress."

From the foregoing opinions of Sir Wm. Scott, it may be collected that all provisions going to an enemy's port are, in strictness, confiscable as contraband; but that, in the case of provisions in their rude state, such as wheat, the strict right of confiscation is waived by the belligerent for the more lenient exercise of pre-emption; that, nevertheless, where those provisions are manufactured for use, as, if the wheat be baked into biscuit, the rigour of the original right revives, and the penalty of confiscation for contraband may be, in strictness, enforced.

From a further position, laid down by the same learned judge in the case of the Jonge Margaretha (1), it will be found that of all circumstances in the interpretation of contraband, none will be deemed more materially to affect the cargo than the destination with which it is sailing. "The most important distinction," continued he, "is, whether the articles were intended for the ordinary use of life, or even for mercantile ships' use, or whether they were going with a highly probable destination to military use. Of the matter of fact on which the

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(1) 1 Rob. Rep. 189. Vid. et 6 Rob. Rep. 126. 6 Rob. Rep. 93. 4 Rob. Rep. 33. 5 Rob. Rep. 97.

distinction is to be applied, the nature and quality of the port to which the articles were going, is not an irrational test; if the port is a general commercial port, it shall be understood that the articles were going for civil use, although occasionally a frigate, or other ships of war, may be constructed in that port. On the contrary, if the great predominant character of a port be that of a port of naval military equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place, and although it is possible that the articles might have been applied to civil consumption; for it being impossible to ascertain the final application of an article ancipitis usûs, it is not an injurious rule which deduces, both ways, the final use from the immediate destination; and the presumption of a hostile use, founded on its destination to a military port, is very much inflamed if, at the time when the articles were going, a considerable armament was notoriously preparing, to which a supply of those articles would be eminently useful."

There are some articles decidedly contraband in their nature, such as tar and pitch: which, however, when they are the produce of the claimant's own country, have been exempted from the penalty attaching upon contraband in general; as it has been deemed a harsh exercise of a belligerent right to prohibit a material branch of a neutral's natural trade. "But," said Sir William Scott, in the case of the Sarah Christina (1), "this relaxation is understood with a condition that the cargo may be brought in, not indeed for confiscation, but for pre-emption."

Except in cases of relaxation like these, where the practice of pre-emption has interposed, it usually happens that when the goods are once clearly shewn to be contraband, confiscation to the belligerent captor ensues, as a matter of course. "Barely to stop such goods," says Vattel (2), "would in general prove an ineffectual mode, especially at sea, where there is no possibility of entirely cutting off all access to the enemy's harbours. Recourse is therefore had to the expedient of confiscating all contraband goods that we can seize on, in order that the fear of loss may operate as a check on the avidity of gain, and deter the merchants of neutral countries from supplying the enemy with such commodities. And, indeed, it is an object of such high import-

(1) 1 Rob. Rep. 237. 1 Rob. 26. 1 Rob. 89. 1 Rob. 242.

(2) Vatt. b. 3. ch. 7. sect. 113.

ance to a nation at war, to prevent, as far as possible, the enemy's being supplied with such articles as will add to his strength, and render him more dangerous, that necessity, and the care of her own welfare and safety, authorize her to take effectual methods for that purpose, and to declare that all commodities of that nature destined for the enemy, shall be considered as lawful prize. On this account, she notifies to the neutral states her declaration of war; whereupon the latter usually gives orders to their subjects to refrain from all contraband commerce with the nations at war, declaring, that if they are captured in carrying on such trade, the sovereign will not protect them. This rule is the point where the general custom of Europe seems at present fixed, after a number of variations. And, in order to avoid perpetual subjects of complaint and rupture, it has, in perfect conformity to sound principles, been agreed that the belligerent powers may seize and confiscate all contraband goods which neutral persons shall attempt to carry to their enemy, without any complaint from the sovereign of those merchants; as, on the other hand, the power at war does not impute to the neutral sovereigns these practices of their subjects."

It is necessary for a neutral, if he would escape the danger of these seizures, to be exceedingly circumspect in his whole voyage. From the case of the Trende Sostre (1) it appears that he will not be permitted with impunity to touch at an enemy's port, if he have contraband goods on board, upon any excuse, however genuine, of selling other things less objectionable in their nature. Innocent articles, if they are so unfortunate as to be in company with obnoxious commodities, must take the ill consequences resulting from such an association. They must proceed to some other port, where the enemy is not established, and where the obnoxious commodities consequently lose their contraband character, and become fair articles of general trade. For though sailcloths and hemp are most mischievous materials, if they be sailing to a hostile market, yet a belligerent nation interposes no objection against the transfer of such commodities from a neutral possessor to her own subjects, or to another neutral.

It is a metaphorical maxim very frequently to be met with in the cases upon these captures, that contraband is of an infectious nature, and contaminates the whole cargo. The innocence,

(1) Reported in a note to the case of the Lisette, 6 Rob. Rep. 390.

therefore, of any particular article, is not usually admitted to exempt it from the general confiscation. By the ancient law of Europe, the ship also was liable to condemnation: "Nor can it be said," observed Sir William Scott, in the case of the Ringende Jacob, (1) "that such a penalty was unjust, or not supported by the general analogies of law, for the owner of the ship has engaged it in an unlawful commerce. But in the modern practice of the Courts of Admiralty of this country, (and I believe of other nations also,) a milder rule has been adopted, and the carrying of contraband articles is attended only with the loss of freight and expences, except where the ship belongs to the owner of the contraband cargo, or where the simple misconduct of carrying a contraband cargo has been connected with other malignant and aggravating circumstances." (2) Among such circumstances, those of false destination and false papers are considered as the most heinous. (3) "These," as it was said by the Court in the case of the Neutralitet (4), "constitute excepted cases out of the modern rule, and continue them under the ancient one." And it has been recently decided that contraband, concealed out, affects the ship, however remote her return voyage may be (5), and that the misconduct of a supercargo in this respect affects the ship-owner. (6) The ancient law and the modern relaxations are collected by Dr. Robinson, in a very learned note to the case of the Franklin (7).

Violation of blockade.

Having thus fully considered the nature of this contraband commerce, and its consequences to the neutral who engages in it, we will now examine how a neutral may forfeit the immunities of his national character, by violations of blockade. "If," says Vattel (8), "I lay siege to a place, or simply blockade it, I have a right to hinder any one from entering, and to treat as an enemy whosoever attempts to enter the place, or carry any thing to the besieged, without my leave; for he opposes my undertaking, and may contribute to the miscarriage of it, and this involves me

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(1) 1 Rob. Rep. 89.

(2) Charlotte, 5 Rob. 275. Eleonora Wilhelmina, 6 Rob. 331. Parkin v. Dick, 2 Campb. 221. Ringende Jacob, 1 Rob. 89. Jonge Tobias, 1 Rob. 330.

(3) Mercurius, 1 Rob. 288. Oswell v. Vigne, 15 East, 73. ante.

(4) 3 Rob. Rep. 295. See also the Baltic, 1 Acton's Rep. 25. and id. 333.

(5) The Margaret, 1 Acton's Rep. 333.

(6) 1 Acton's Rep. 25.

(7) Franklin, 3 Rob. Rep. 221. note.

(8) Vatt. b. 3. ch. 7. s. 117. As to distinction between military and commercial blockade, and their effect, see 1 Acton's Rep. 128.

in all the misfortunes of an unsuccessful war." It has been well observed (1), that amongst the rights of belligerents, there is none more clear and incontrovertible, or more just and necessary as to its application, than that which gives rise to the law of blockade, as it has been ascertained, defined, and administered by the maritime tribunals in this country. The greater the research that shall be made into the principles of natural law, the more the details of the diplomatique and conventional history of Europe shall be studied, the more will it appear that this right has its origin in the purest sources of maritime jurisprudence, that it is sanctioned by the practice of the best times, and above all, that it is so essentially connected with the vital interests of Great Britain, that the renunciation of it, under any circumstances, must be regarded as the renunciation of one of the firmest charters of our naval pre-eminence, and as the surrender of one of the surest bulwarks of our national independence. Clear, however, and indisputable as this right is, just and necessary as is the exercise of it, it cannot be denied but that it is one of the most severe and harsh in its operation of any that is inscribed in the whole code of public law. It is under this impression that tribunals of the law of nations, before they have enforced the provisions of a blockade, have uniformly required it to be established by clear and unequivocal evidence, first, that the party proceeded against has had due notice of the existence of the blockade, and secondly, that the squadron allotted for the purposes of its execution, was fully competent to cut off all communications with the interdicted port. These points have been deemed so indispensably requisite to the existence of a legal blockade, that the failure of either of them has been held to amount to an entire defeazance of the measure, and this even in cases where the notification of it has issued immediately from the fountain of supreme authority (2).

" On the question of blockade," said Sir William Scott, in the case of the Betsy (3), " three things must be proved, 1st, the existence of an actual blockade; 2ndly, the knowledge of the party; and thirdly, some act of violation, either by going in or by coming out with a cargo laden after the commencement of blockade." We will consider each of these three points in its order.

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(1) Dr. Phillimore on licence trade, 49. 1 Acton's Rep. 59.

(2) This was decided in the Court of Appeal, in Feb. 1792. Dr. Phillimore on Licence Trade, 52. in notes.

(3) 1 Rob. Rep. 92. See also the case of the Nancy, 1 Acton's Rep. 59

First, then, there must be the existence of an actual blockade. It must have been declared by competent authority; and, as a declaration of blockade is a high act of sovereignty, it was held in the case of the Henrick and Maria (1), that a commander of a king's ship is not to extend it. But, from the case of the Rolla (2), it should seem that this limitation of a commander's power is held to subsist only "on stations in Europe, where government is almost at hand to superintend the course of operations; and that a commander going out to a distant station, may reasonably be supposed to carry with him such a portion of sovereign authority delegated to him as may be necessary to provide for the exigencies of the service on which he is employed." **Actual blockade necessary.**

The blockade must not only have been declared by competent authority, but must be also an actually existing blockade. A blockade is then only to be considered as actually existing, when there is a power to enforce it (3). "The very notion of a complete blockade," said Sir William Scott, in the case of the Stert (4), "includes that the besieging force can apply its power to every point of the blockaded state. If it cannot, there is no blockade of that part where its power cannot be brought to bear." We find, however, from the case of the Frederick Molke (5), that "it is not an accidental absence of the blockading force, nor the circumstance of being blown off by wind, (if the suspension and the reason of the suspension are known,) that will be sufficient in law to remove a blockade." But if the relaxation happen not by such accidents as these, but by the mere remissness of the cruizers stationed to maintain the blockade, (who are too apt, by permitting the passage of some vessels to give fair ground to others for supposing the blockade concluded,) then it is impossible for a court of justice to say that the blockade is actually existing. "It is in vain," said Sir William Scott, in the case of the Juffrow Maria Schroeder (6), "for governments to impose blockades, if those employed on that service will not enforce them. The inconvenience is very great, and spreads far

(1) 1 Rob. Rep. 146.
(2) 6 Rob. Rep. 367.
(3) Mercurius, 1 Rob. Rep. 80.
(4) 4 Rob. Rep. 66. 1 Acton, 61, 5. Ld. Erskine's speech, 8th March, 1808, on the Orders in Council, 10 Cobbett's Parl. Deb. 949, 950.
(5) 1 Rob. Rep. 86. 1 Rob. 93, 94, 147. 156. 1 Acton's Rep. 59.
(6) 3 Rob. Rep. 156. Ibid. 158, 159. note. 1 Acton's Rep. 59.

beyond the individual case. Reports are eagerly circulated, that the blockade is raised; foreigners take advantage of the information; the property of innocent persons is ensnared, and the honour of our own country is involved in the mistake."

Mr. Serjeant Marshall (1), in his excellent work on insurance, observes, that, "not only a single port, but a number of ports, and even a great extent of coast may be blockaded. In the month of March, 1799, the British government notified to all neutral powers, that the ports of Holland were all invested and blockaded by the British forces: and that every vessel, of whatever flag, every cargo, and every bottom, attempting to enter them, would become forfeited by the law of nations, as attempting to carry succour to the besieged. It must be admitted, that in no former war had the blockading system been pushed to this extent; but this has been not for want of right, but for want of power. If a single port may be blockaded by a single squadron, which has never yet been disputed, a number of squadrons may blockade a certain extent of coast; and if a country possesses the power and means, and will incur the expense and hazard, of covering the whole extent of an enemy's coast, it becomes entitled, upon the same principle, to the same exemption from neutral interference, as if, with a single division, it invested a single fortress.

Knowledge of blockade necessary.

The second point to be examined is the knowledge which the neutral may have respecting the blockade of any particular port: since, in order to affect him with the penal consequences of a violation, it is absolutely necessary for him to have been sufficiently informed of the blockade itself. This sufficient information may be communicated to him in two ways: by a formal notification from the blockading power, or by the notoriety of the fact. "To make a notification effectual and valid," said Sir Wllliam Scott, in the case of the Rolla (2), "all that is necessary is that it shall be communicated in a credible manner: because, though one mode may be more formal than another, yet any communication which brings it to the knowledge of the party, in a way which could leave no doubt in his mind as to the authenticity of the information, would be that which ought to

(1) Marshall, b. 1. c. 3. s. 3. 1 Acton. Rep. 63.
(2) 6 Rob. Rep. 367.

govern his conduct, and will be binding upon him. It is at all times most convenient that the blockade should be declared in a public and distinct manner, instead of being left to creep out from the consequences produced by it."

The effect of a notification to a foreign government, is to include all the individuals of that nation. "It would be the most nugatory thing in the world," said Sir William Scott, in the case of the Neptunus (1), "if individuals were allowed to plead their ignorance of it. It is the duty of foreign governments to communicate the information to their subjects, whose interests they are bound to protect: I shall hold, therefore, that a neutral master can never be heard to aver, against a notification of blockade, that he is ignorant of it." A subsequent decision in the case of the Adelaide (2), goes further yet, and establishes, that a notification given to one state must be presumed, after reasonable time, to have reached the subjects of neighbouring states also, binding them, though not of its own force, yet by way of evidence. But a reasonable time is allowed for the promulgation of the notice, so that neutrals are held to be bound by it, not from the precise moment when it was given to the government, but from the period when it may fairly be supposed to have reached themselves (3).

When once the notice, actually or constructively, has reached the neutral, he is not permitted to go to the station of the blockading force, upon pretence of inquiring whether blockade have terminated. "The merchant," said Sir William Scott, in the case of the Spes and Irene (4), "is not to send his vessel to the mouth of the river, and say, 'If you don't meet with the blockading force, enter; if you do, ask a warning, and proceed elsewhere.' Who does not at once perceive the frauds to which such a rule would be introductory? The true rule is, that, after the knowledge of an existing blockade, you are not to go to the very station of blockade under pretence of inquiry."

In adventures from America, indeed, the Court allowed some relaxation of this rule, on account of the distance of that country.

(1) 2 Rob. Rep. 110. Welvaart Van Pillaw, 2 Rob. 128. as to the effect of general notoriety of blockade de facto upon neutrals. 1 Acton Rep. 61 and 62.

(2) 2 Rob. Rep. 110. in notes.

(3) Jonge Petronella, 2 Rob. Rep. 131. Calypso, 2 Rob. 298.

(4) 5 Rob. Rep. 76.

This relaxation, as explained in the last mentioned case, was "that ships sailing from America, before the knowledge of the blockade had reached America, should be entitled to a notice, even at the blockaded port, and that ships sailing afterwards, might sail on a contingent destination even for that port, with the purpose of calling at some British port, or at some neutral port, for information, and that they should be allowed the benefit of such a contingent destination to be ascertained and rendered definite by the information which they should receive in Europe. But in no case was it held that they might sail to the mouth of a blockaded port to inquire whether a blockade, of which they had received previous formal notice, was still in existence or not. If particular parties are innocent in their intention, it is still a measure of necessary caution, and of preventive legal policy, to hold the rule general, against the liberty of inquiring at the very mouth of the blockaded port: which would amount, in practice, to a universal licence to attempt to enter, and, on being prevented, to claim the liberty of going elsewhere.

The indulgence, thus limited, was considered as due in reason to the American merchants. "For," observed Sir William Scott in the case of the Betsy (1), "Lying at such a distance, where they cannot have constant information of the state of the blockade, whether it continues or is relaxed, it is not unnatural that they should send their ships conjecturally, upon the expectation of finding the blockade broken up, after it had existed for a considerable time. A very great disadvantage indeed would be imposed upon them, if they were bound rigidly by the rule, which justly obtains in Europe, that the blockade must be conceived to exist till the revocation of it is actually notified; for, if this rule is rigidly applied, the effect of the blockade would last two months longer upon them than on the trading nations of Europe, by whom intelligence is received almost as soon as it is issued."

The receipt of the notification will not prevent a neutral, who, at the time of receiving it, is lying in the very port blockaded, from retiring freely: and it has even been laid down in the case of the Betsy (2), that he may retire with a cargo which he may already have laden, and which has thereby become actually

(1) 1 Rob. Rep. 332. Neptunus, 2 Rob. 114. Vrow Johanna, 2 Rob. 109.; and see also 1 Acton Rep. 141. 161.

(2) 1 Rob. Rep. 92. and 152.

neutral property: the distinction being, that he is not at liberty to make any fresh purchase after the notification. From the case of the Rolla (1) it appears, that the court will hold every cargo to be a fresh purchase which was not delivered, previously to the notification, either on board the neutral ship itself, or in lighters.

The notification of blockade must be legal and regular. During a blockade, which extended only to Amsterdam, an English commander gave a notice to a neutral entering Amsterdam of blockade upon all Dutch ports. The notice was held to be invalid (2), 1st, with reference to the other ports, because, as we have seen, a commander of a king's ship has no right to enlarge a blockade; and, 2dly, with reference to Amsterdam itself, "Because," said Sir William Scott, "it took from the neutral all power of election as to what other part of Holland he should enter, when he found the port of his dsetination under blockade. A commander of a ship must not reduce a neutral master to this kind of distress; and I am of opinion, that if the neutral had contravened the notice, he would not have been subject to condemnation."

No formal notification can ever be necessary for vessels lying within the blockaded port. "The continued fact," said Sir William Scott, in the case of the Vrow Judith (3), "is itself a sufficient notice: it is impossible for those within to be ignorant of the forcible suspension of their commerce; the notoriety of the thing supersedes the necessity of particular notice to each ship."

This brings us to the consideration of the other mode, in which, as we have already seen, a neutral may receive what shall be deemed sufficient information of a blockade, that is, by the notoriety of the fact. "If," says Sir William Scott, in the case of the Columbia (4), "you can affect a neutral with the knowledge of the fact, a formal warning becomes an idle ceremony, of no use, and not to be required. But the sight of one vessel, before a harbour, would not be sufficient notice to a neutral, though that vessel might alone be adequate to the operations of the blockade." There must be an apparent, or notorious blockade, in order to affect a neutral with knowledge, unless there be

(1) 6 Rob. Rep. 364.

(2) Henrich and Maria, 1 Rob. 146. Rolla, 6 Rob. 364.

(3) 1 Rob. Rep. 152.

(4) 1 Rob. Rep. 156. 1 Rob. Rep. 83. 1 Rob. Rep 146.

individual proof that he had received specific information of it (1). On the other hand, if the fact be of a nature manifestly notorious, a person violating such a blockade will be considered prima facie, as having knowingly offended; but he may be admitted to give evidence of his ignorance. For there is a distinction between this case, of a knowledge by the notoriety of the fact, and the before mentioned cases, of knowledge by formal notice. In these cases we have seen, that no plea of ignorance is ever admitted; in this, such a plea will be allowed, if fairly established. This rule is laid down in the cases of the Hurtige Hane (2) and of the Neptunus (3). In the latter, there is also this further distinction taken between the two classes of cases: that, in the cases of a notification formally given, the act of sailing to the blockaded port with a contingent destination to enter if the blockade be raised, and to proceed if it be not, is sufficient to constitute the offence. It is to be presumed, that the notification will be formally revoked, and that due notice will be given of it; till that is done, the port is to be considered as closed up; and, from the moment of quitting port to sail on such a destination, the offence of violating the blockade is complete, and the property engaged in it subject to confiscation. It may be different in a blockade existing de facto only. There, no presumption arises as to the continuance; and the ignorance of the party may be admitted, as an excuse, for sailing on a doubtful and provisional destination."

What is a violation of blockade.

Thus, we have gone through two of the three points which are chiefly necessary to be considered in the question of blockade, namely, the existence of an actual blockade, and the neutral's knowledge of it. It remains for us to examine the third point, namely, the violation of the blockade, so existing and so known. This violation may be, either, by going into the place blockaded, or by coming out of it with a cargo laden after the commencement of the blockade. But, in order to constitute such a going into the blockaded port as will subject the neutral to the penalties of confiscation, it is not necessary that the entrance be completed into the very heart of the harbour. Vessels are not permitted even to place themselves in the vicinity, if their situation be so near that they may, with impunity, break the blockade whenever they please. "If a vessel could under pretence of

(1) Mercurius, 1 Rob. 83. 6 Rob. 65.

(2) 3 Rob. Rep. 324.

(3) 2 Rob. Rep. 110.

proceeding farther, approach close to the blockaded port, so as to be in a condition to slip in without obstruction, then," said Sir William Scott, in the case of the Neutralitet (1), "it would be impossible that any blockade could be maintained. It would, I think, be no unfair rule of evidence, to hold, as a presumption de jure, that she goes there with an intention of breaking the blockade; and if such an inference may possibly operate with severity in particular cases, where the parties are innocent in their intentions, it is a severity necessarily connected with the rules of evidence, and essential to the effectual exercise of this right of war." Still less is a neutral permitted to place himself in such a situation as to be within the protection of the batteries on the shore. (2)

A blockade is broken as completely by coming out as by going in. "There may be instances indeed, of innocent egress," said Sir Wm. Scott, in the case of the Frederick Molke (3), "instances where the vessels have gone in before the blockade; and, under such circumstances, it could not be maintained that they might not be at liberty to retire. But the utmost that can be allowed to a neutral vessel is, that having already taken on board a cargo before the blockade begins, she may be at liberty to retire with it. But it must be considered as a rule which this court means to apply, that neutral ships departing, can only take away a cargo bonâ fide purchased and delivered before the commencement of the blockade. If she afterwards take on board a cargo, it is a fraudulent act, and a violation of the blockade."

In some cases, the violations of blockade may be excusable. In cases of this nature, the whole burthen of exonerating himself from the penal consequences lies upon the party. He must show that he was led into the blockaded port by some accident which he could not control, or by some want of information which he could not obtain; in doing this, he must prove his whole case; and however innocent his intentions may have been, he must explain his conduct in a way consistent, not only with the innocence of himself and his owner, but he must bring

What excuses violations of blockade.

(1) 6 Rob. Rep. 30.

(2) Charlotte Christine, 6 Rob. Rep. 101. Gute Erwartung, 6 Rob. 182.

(3) 1 Rob. Rep. 86. 92. 150. 172. 6 Rob. Rep. 361. 5 Rob. Rep. 27. 256. 2 Rob. Rep. 124. 1 Edwards, 33.; and see case of Charlotte, 1 Edwards, 252.

it within those principles which the court has found it necessary to lay down for the protection of the belligerent right, and without which no blockade can ever be maintained. An excuse that the ship went in to procure a pilot for another port is insufficient. (1)

The invention of neutrals has been abundantly fertile in providing excuses for their violations of blockade, but these excuses are received by the belligerent Courts of Admiralty with much suspicion. "An excuse," said Sir William Scott, in the case of the Fortuna (2), "in order to be admissible, must shew an imperative and overruling compulsion to enter the particular port under blockade. This can scarcely ever be the case with respect to mere want of provisions. That want may drive the master to seek some port, but can hardly force him to resort exclusively to the port blockaded." A continued gale of wind however may sometimes furnish an excuse.

If a place be blockaded only by sea, it is no violation of the belligerent rights for a neutral to carry on commerce with it by inland communications. In the case of the Ocean (3), which was a case arising out of the blockade of Amsterdam, Sir William Scott said (4), "The legal consequences of a blockade must depend on the means of a blockade, and on the actual or possible application of the blockading force. On the land side, Amsterdam neither was nor could be affected by a blockading naval force. It could be applied only externally; the internal communications of the country were out of its reach, and in no way subject to its operation." And in another case (5), arising out of the same blockade, he said, "The blockade of Amsterdam is, from the nature of the thing, a partial blockade, a blockade by sea; and if goods are going to Embden, with an ulterior destination by land to Amsterdam, or by an interior canal navigation, it is not, according to my conception, a breach of the blockade."

Effect of violation of blockade.

We will now consider the effect of those violations of blockane which have been thus defined. "Prima facie," said Sir

(1) The Arthur, 1 Edwards, 203.

(2) 5 Rob. Rep. 27. Adonis, 5 Rob. 256. Exchange, 1 Edwards, 39. Hurtige Hane, 2 Rob. 124.

(3) 3 Rob. Rep. 297.

(4) Ocean, 3 Rob. 297.

(5) Jong Pictor, 4 Rob. 79. Stert, 4 Rob. 65. Maria, 6 Rob. 204.

William Scott, in the case of the Neptunus (1), "the cargo is considered as liable to the same judgment with the ship." But evidence will be generally admitted, on the part of the owners of the cargo, to exonerate them from the guilt in which the vessel is implicated; for though the presumption is always against them, yet it is not impossible that the master alone may have been to blame. In cases however where any privity appears between the owners of the cargo and the master, the subsequent imputation of the entire blame to the master alone will not avail to protect the owners of the cargo.

In the Juffrow Maria Schroeder (2), the cargo was even placed in a worse situation than the ship: for the ship was restored on the ground of her having been permitted by licence to take a cargo in, and being therefore fairly at liberty to bring a cargo out: but an evil intention appearing on the part of the owners of the cargo to slip it out whenever an opportunity should occur, the cargo was condemned. From the same case it farther appears, that where a ship has contracted guilt, by sailing with an intention of entering a blockaded port, or by sailing out, "the offence is not purged away until the end of the voyage; till that period is completed, it is competent to any cruizers to seize and proceed against her for that offence (3)." "When a vessel enters an interdicted port," said Sir William Scott, in the case of the Christianberg (4), "the offence is consummated, and the intention is for the first time declared. It is not till the vessel comes out again, that any opportunity is afforded of vindicating the law, and of enforcing the restriction of this order. It is objected that, if the penalty is applied to the subsequent voyage, it may travel on with the vessel for ever. In principle perhaps it might, not unjustly, be pursued farther than to the immediate voyage. But we all know, that in practice it has not been carried farther than to the voyage succeeding, which affords the first opportunity of enforcing the law."

But though the offence is consummated by the act of sailing, yet if between the times of sailing and of capture the blockade have been raised, that offence is held to be wiped away. This

(1) 3 Rob. Rep. 173. Juffrow Maria Schrœder, 3 Rob. 147. Adonis, 5 Rob. 256. Exchange, 1 Edw. 39. Mercurius, 1 Rob. 80. Alexander, 4 Rob. 93.

(2) 3 Rob. Rep. 147.

(3) Juffrow Maria Schroeder, 3 Rob. 147. Acton, 25.

(4) 6 Rob. Rep. 376. Welvaart Van Pillaw, 2 Rob. 128

was decided in the case of Lisette (1), on the ground that the necessity of applying the penalty to prevent future transgression continued no longer, after the cessation of the blockade.

Now with respect to the circumstances under which a blockade may be deemed to have ceased, the case of the Hoffnung (2) seems to have firmly established, that the raising of a blockade by a superior force is a total defeasance of that blockade and of its operations. "A new course of events arises," said Sir William Scott, which may tend to a very different disposition of the blockading force, and which introduces therefore a very different train of presumptions in favour of the ordinary freedom of commercial speculations. In such a case, the neutral merchant is not bound to forsee or to conjecture that the blockade will be resumed; and therefore, if it is to be renewed, it must proceed de novo, and without reference to the former state of facts which has been so effectually interrupted."

Illegal assistance by conveying dispatches.

On the same principle on which contrabands of war and infractions of blockade have been interdicted in the commerce of neutrals, I mean the principle, that a neutral has no right to relieve a belligerent against the direct hostility of his enemy, it has been held, that other acts of illegal assistance afforded to an enemy, expose to confiscation the property of the neutral concerned in them. Among these, none is of a more injurious nature than the conveyance of hostile dispatches. A full review of the authorities and a summary of the principles on this subject, will be found in Sir William Scott's judgment in the case of the Atalanta (3). The vessel bearing that name had been captured, carrying dispatches from a French colony to Paris. The mischievous consequence of such a service is indefinite, infinitely beyond the effect of any contraband that can be conveyed; the carrying of two or three cargoes of stores is necessarily an assistance of a limited nature: but in the transmission of dispatches may be conveyed the entire plan of a campaign, that may defeat all the projects of the other belligerent in that quarter of the world.

The strict rule of the law of nations originally was, as we have already seen, that in cases of contraband the ship should be

(1) 6 Rob. Rep. 387.
(2) 6 Rob. Rep. 112. Tuketen, 6 Rob. 65.; and see 1 Acton's Rep. 59. 61. 261.
(3) 6 Rob. Rep. 440. 1 Edw. 41.

confiscated as well as the cargo. Modern practice has, in most cases of contraband, though not in all, very leniently relaxed that rule. But as the conveyance of dispatches is a much greater offence, and as that offence, though committed by the master, is to be taken as virtually the offence of the owner of the shi , according to that rule of law which makes the principal responsible for the acts of his agent, the court in this case thought it proper to condemn the ship. In cases of contraband, the forfeiture of the goods themselves, and the loss of the freight by the master, are penalties of considerable force. "But," observed Sir William Scott, "to talk of the confiscation of dispatches would be ridiculous. There would be no freight dependant on it, and therefore the same precise penalty cannot, in the nature of things, be applied. It becomes absolutely necessary as well as just, to resort to some other measure of confiscation, which can be no other than that of the vehicle."

The owners of the cargo, as appears from the same case (1), are resposible only as in other instances, where they are actually culpable, or where a privity subsists between them and the master, which involves them, by implication, in his delinquencies.

The case of the Caroline (2), turns upon the same question; and Dr. Robinson has subjoined a valuable note, containing several interesting authorities. In this case of the Caroline, however, the ship and cargo were restored to the neutral claimants, because it appeared that the dispatches on board were not (as in the last case) going to the mother country of the enemy, from the enemy's colony, but only from the enemy's ambassador resident in a neutral country. "The neutral country," said Sir William Scott, "has a right to preserve its relations with the enemy, and you are not at liberty to conclude, that any communications between them can partake in any degree of the nature of hostility against you. The enemy may have his hostile projects to be attempted with the neutral state; but your reliance is on the integrity of that neutral state, that it will not favour nor participate in such designs, but, as far as its own counsels and actions are concerned, will oppose them. Another distinction," continued the learned judge, "arises from

(1) Vide et Rapid, 1 Edwards, 228.

(2) 6 Rob. Rep. 461. Madison 1 Edwards, 221.

the character of the person who is employed in the correspondence. He is not an executive officer of the government, acting simply in the conduct of its own affairs, within its own territories, but an ambassador resident in a neutral state, for the purpose of supporting an amicable relation with it. I have before said, that persons discharging the functions of ambassadors, are, in a peculiar manner, objects of the protection and favour of the law of nations."

Carrying troops, &c.

Equally intolerable is the employment of a neutral ship, as a transport for the private men, or for the officers of the enemy; and such vessels were accordingly condemned, in the cases of the Friendship (1), and the Orozembo (2).

Trade contrary to treaty.

There is yet another species of commerce, which is illegal to the neutral engaged in it. It is that which he may be carrying on, in contravention of particular treaties, concluded with either belligerent. In this case, the belligerent, whose compact is thus violated, has a right to call the neutral to account for his misconduct (3).

Submission of Neutral to outrages of one of the Belligerents.

It appears also to be admitted, that if a belligerent adopts a mode of conduct towards a neutral, which amounts to an act of hostility, and in which that neutral acquiesces, the other belligerent has a right to retaliate (4); and that if a decree interdicting a neutral from trading with us, or visiting our ports, is executed upon him, it is an interdiction he has no right to submit to, because the moment it is executed, we are injured by the interruption of his commerce with us. If he submits, from favour, to the unjust belligerent, he directly interposes in the war, and the neutral character is at an end; retaliation then would not only be strictly applicable, but just and legal; and if he submits from weakness or from any other cause not hostile or fraudulent, we have an unquestionable right, without any invasion of neutrality, to insist, that what he suffers from the enemy he shall consent to suffer from us, otherwise he would keep an open trade with the enemy at our expence, relieving him from the pressure of the war, and becoming an instrument

(1) 6 Rob. Rep. 420.

(2) 6 Rob. Rep. 430.

(3) See the cases in Marshall, p. 1. ch. 8. sec. 15. p. 319.

(4) Lord Holland's Speech, 26 Feb. 1808, on Orders in Council, 10 Cobbett's Parl. Deb. 783. See also Baring on Orders in Council, 110, 1.

of its illegal pressure upon us. In that case also the term retaliation, though not applicable perhaps in literal strictness, as it applies to the neutral, is substantially and justly applicable to him; because it is, in fact, retaliation upon the enemy through the sides of the neutral, in a case where the injury to us cannot exist without the participation of the neutral, in doing or suffering, by either of which our commerce is alike interrupted (1). It was on this principle that Sir William Scott, in the case of Nayade (2), decided, that goods the property of a merchant resident in Portugal, and consigned from thence to Bourdeaux, were liable to capture by a British vessel, the Portuguese having submitted to repeated insults from France, though she had not declared war.

Having thus considered the illegal acts by the commission of which a neutral trade may forfeit the natural immunities of his own commerce, as by contraband traffic, transgressions of blockade, the conveyance of dispatches or of troops, and by the contravention of particular treaties, or submission to the outrages of one of the belligerents—all which illegal acts are of an intelligible and unequivocal character—we will now examine a class of cases of a less decided character, cases of commerce so constituted as not to be necessarily fraudulent, though they usually are so. I speak of that commerce which either belligerent forbids to neutral states in time of peace, but permits them to enjoy in time of war; possibly, indeed, with a fair design, but more probably with the fraudulent and collusive intention of covering and withdrawing his own possessions from the grasp of his enemy's hostility. The possibility of fair dealing makes it impracticable to decide, ipso facto, on any particular adventure, that it is fraudulent and collusive; and therefore, on the other hand, the strong probability of fraud and collusion has made it necessary for the belligerents to declare that such adventures shall not be tolerated at all. The principal branches of trade which are thus incessantly liable to abuse, and from which it has therefore been deemed necessary that neutrals shall be totally excluded, are the enemy's coasting trade and the enemy's colonial trade.

(1) Lord Erskine's speech, 8 March 1808, on the Orders in Council, 10 Cobbet's Parl. Deb. 938.

(2) 4 Rob. Rep. 251.

Coasting trade. It has long been the policy of almost all nations to preserve, exclusively in the hands of their own subjects, all the traffic carried on between the ports of their own coast; and nothing, except the accidental and insuperable necessities of war, has been usually thought sufficient to justify the slightest deviation from that policy. When a neutral, therefore, presents himself in the character of a trader engaged in the coasting trade of the enemy, does he not present himself in the character rather of the enemy's ally than of a neutral properly so called? Is he not the willing and active instrument of relieving one belligerent from the extremities to which the other has lawfully reduced him? "Is there nothing," to use the words of Sir William Scott (1), "like a departure from the strict duties, imposed by a neutral character and situation, in stepping in to the aid of the depressed party, and taking up a commerce, which so peculiarly belonged to himself, and to extinguish which was one of the principal objects and proposed fruits of victory? Is not this, by a new act, and by an interposition neither known nor permitted by that enemy in the ordinary state of his affairs, to give a direct opposition to the efforts of the conqueror, and to take off that pressure which is the very purpose of war to inflict, in order to compel the conquered to a due sense and observance of justice?"

"As to the *coasting trade*," continues the learned judge, "supposing it to be a trade not usually open to foreign vessels, can there be described a more effective accommodation that can be given to an enemy during a war, than to undertake it for him during his own disability? Is it nothing that the commodities of an extensive empire are conveyed from the parts where they grow and are manufactured, to other parts where they are wanted for use? It is said, that this is not importing any thing new into the country, and it certainly is not: but has it not all the effects of such an importation? Suppose that the French navy had a decided ascendant, and had cut off all British communication between the northern and southern parts of this island; and that neutrals interposed, to bring the coals of the north for the supply of the manufactures, and for the necessities of domestic life in this metropolis, is it possible to describe a more direct and more effectual opposition to the success of

(1) The Emanuel, 1 Rob. Rep. 296. The Ebenezer, 6 Rob. Rep. 252.

French hostility, short of an actual military assistance in the war? The duties of neutrality are clearly expressed in Lord Howick's letter to Mr. Rist (1) in the following words: "Neutrality, properly considered, does not consist in taking advantage of every situation between belligerent states, by which emolument may accrue to the neutral, whatever may be the consequences to either belligerent party; but in observing a strict and honest impartiality, so as not to afford advantage, in the war, to either; and particularly in so far restraining its trade to the accustomed course, which is held in time of peace, as not to render assistance to one belligerent in escaping the effect of the other's hostilities. The duty of a neutral is "non interponere se bello, non hoste imminente hostem eripere;" and yet it is manifest that lending a neutral navigation to carry on the coasting trade of the enemy, is in direct contradiction to this definition of neutral obligations, as it is in effect to rescue the commerce of the enemy from the distress to which it is reduced by the superiority of the British navy, to assist his resources, and to prevent Great Britain from bringing him to reasonable terms of peace."

Formerly the courts of admiralty in Great Britain were so strict in the enforcement of the prohibition against the interference of neutrals in the coasting trade of the enemy, that all neutral vessels found engaged in that trade were subjected to the penalty of confiscation. In later times, and until the late orders in council, that penalty was alleviated, and the neutral was considered subject only to the forfeiture of the freight: which, as we have before seen (2), is in other cases usually paid by the captor to the neutral owner, whenever he takes from that neutral any cargo belonging to the enemy. For though it be perfectly fair that we seize on the property of an enemy, wheresoever we find it, yet it is also necessary, in point of justice, that we indemnify the neutral for the loss which we thus occasion him to undergo; his trade, in carrying innocent merchandize for the enemy, being a trade completely legitimate as to him, and in no way affected in its legitimacy by the hostility of the belligerents; but when he is detected in the act of interfering with a trade which is not legally permitted to him, a trade which the hostility of the belligerents is the sole cause of throwing into his

(1) 10 Cobbett's Parl. Deb. 406.

(2) Ante, 444. But see Orders in Council, 7 Jan 1807.

power (1), then he is no longer entitled to the same indemnity; and he is treated with very ample indulgence, in being suffered to escape without the confiscation of his ships, in addition to the forfeiture of his freight. The strict ancient law, and the modern relaxations, are collected and digested in the reply of the King's Advocate upon the case of the Johanna Tholen. (2)

But the relaxation of the ancient penalty was not suffered to take effect, when, in addition to the generally obnoxious nature of the trade itself, there appeared to be circumstances of specific fraud in the individual instance. Therefore, in the case of the Johanna Tholen (3), the Court held, that the carrying on of the enemy's trade with false papers subjected the ship to confiscation; and in the case of the Ebenezer (4), the same sentence was pronounced, with respect to the cargo, which happened in that instance to be the property, not of an enemy, but of the neutral himself. For it is impossible not to feel that the fabrication of false papers (5), which are intended to deceive the captors respecting the vessel's real destination, is a gross aggravation of the guilt originally incurred, by the simple act of illegal traffic.

The strict rigour of the prohibition of the interference of neutrals in the coasting trade of a belligerent, was renewed by the order in council of the 7th January, A. D. 1807, which directs, that if any vessel shall be found proceeding from one port in possession of France to another such port, she shall be captured and brought in, and, together with her cargo, shall be condemned as lawful prize. (6)

Colonial Trade. Precisely analogous in its principle is the rule which prohibits the neutral from engaging in the enemy's colonial trade. "Upon the breaking out of a war," said Sir Wm. Scott, in the case of the Immanuel (7), "it is the right of neutrals to carry

(1) See the French Navigation Act, which prohibits the coasting trade of France being carried on except in French-built ships, 1 Acton, 277.

(2) 6 Rob. Rep. 72. See also Dr. Robinson's note to that case; and see also another note, 6 Rob. Rep. 250.

(3) 6 Rob. Rep. 72. The Ebenezer, 6 Rob. Rep. 252.

(4) 6 Rob. Rep. 250. See also Carolina, 3 Rob. Rep. 75.

(5) Phœnix, 3 Rob. Rep. 191.

(6) See observations on this Order, in Lord Erskine's speech, 8th March 1808, on the Orders in Council, 10 Cobbett's Parl. Deb. 945, 6.

(7) 2 Rob. Rep. 197, 8, and

on their accustomed trade, with the exception of the particular cases of a trade to blockaded places, or in contraband articles, (in both which cases their property is liable to be condemned), and of their ships being liable to visitation and search, in which case, however, they are entitled to freight and expences. I do not mean to say, that in the accidents of a war, the property of neutrals may not be variously entangled and endangered. In the nature of human connections, it is hardly possible that inconveniencies of this kind should be altogether avoided. Some neutrals will be unjustly engaged in covering the goods of the enemy, and others will be unjustly suspected of doing it. These inconveniencies are more than fully balanced by the enlargement of their commerce. The trade of the belligerents is usually interrupted, in a great degree, and falls, in the same degree, into the lap of neutrals. But, without reference to accidents of the one kind or other, the general rule is, that the neutral has a right to carry on, in time of war, his accustomed trade, to the utmost extent of which that accustomed trade is capable. Very different is the case of a trade which the neutral has never possessed, which he holds by no title of use and habit in times of peace, and which, in fact, can obtain in war by no other title than by the success of the one belligerent against the other, and at the expence of that very belligerent under whose success he sets up his title. And such I take to be the colonial trade, generally speaking. What is the colonial trade generally speaking? It is a trade generally shut up to the exclusive use of the mother country to which the colony belongs; and this to a double use;—that of supplying a market for the consumption of native commodities, and that of furnishing to the mother country the peculiar commodities of the colonial regions (1). Upon the interruption of a war, what are the rights of belligerents and neutrals respectively, with regard to colonial territories? It is an indubitable right of the belligerent to possess himself of such places as of any other possession of his enemy. This is his common right; but he has the certain means of carrying such a right into effect, if he has a decided superiority at sea. Such colonies are dependent for their existence, as colonies, on foreign supplies; if they cannot be supplied and defended, they must

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see Lord Erskine's speech, 8th March 1808, on the Orders in Council, 10 Cobbett's Parl. Deb. 936.

(1) See the French Navigation Act, 1 Acton, 277, which prohibits the importation of the produce from their colonies in any ships but their own. And see ante, 211.

fall to the belligerent of course; and if the belligerent chooses to apply his means to such an object, what right has a third party, perfectly neutral, to step in and prevent the execution? No existing interest of his is affected by it. He can have no right to apply to his own use the beneficial consequences of the mere act of the belligerent, and to say—True it is, you have, by force of arms, forced such places out of the exclusive possession of the enemy, but I will share the benefit of the conquest, and, by sharing its benefits, prevent its progress. You have, in effect, and by lawful means, turned the enemy out of the possession which he had exclusively maintained against the whole world, and with whom we had never presumed to interfere; but we will interpose to prevent his absolute surrender, by the means of that very opening which the prevalence of your arms alone has effected. Supplies shall be sent, and their products shall be exported. You have lawfully destroyed his monopoly, but you shall not be permitted to possess it yourself; we insist to share the fruits of your victories; and your blood and treasure have been expended, not for your own interest, but for the common benefit of others. Upon these grounds, it cannot be contended to be a right of neutrals to intrude into a commerce which had been uniformly shut against them, and which is now forced open merely by the pressure of war; for when the enemy, under an entire inability to supply his colonies, and to export their products, affects to open them to neutrals, it is not his will, but his necessity, that changes his system; that change is the direct and unavoidable consequence of the compulsion of war; it is a measure not of French counsels but of British force."

Sir William Scott proceeds, in the same case, to observe upon certain other instances of relaxation, afforded by belligerents to neutrals during war, which do not, like the relaxations of the coasting and colonial trades, subject the neutral to any penalty for availing himself of them. "The admission of foreigners," continues he, "into the merchant service, as well as into the military service of this country, the permission given to vessels to import commodities not the growth, produce, and manufacture of the country to which they belong, and other relaxations of the act of navigation, and other regulations founded thereon; these, it is true, take place in war, and arise out of the state of war: but then they do not arise out of the predominance of the enemy's force, or out of any necessity resulting therefrom; and that I take to be the true foundation of the principle. It is not every

convenience, or even every necessity, arising out of the state of the war, but that necessity which arises out of the impossibility of otherwise providing against the urgency of distress inflicted by the hand of a superior enemy, that can be admitted to produce such an effect. Thus, in time of war, every country admits foreigners into its general service. Every country obtains, by the means of neutral vessels, those products of the enemy's country which it cannot possibly receive either by means of its navigation, or its own. These are ordinary measures, to which every country has resort in every war, whether prosperous or adverse. They arise, it is true, out of the state of the war, but are totally independent of its events, and have therefore no common origin with these compelled relaxations of the colonial monopoly. These are acts of distress, signals of defeat and depression; they are no better than partial surrenders to the force of the enemy, for the mere purpose of preventing a total dispossession."

These were the chief grounds and general principle, upon which the court of admiralty proceeded to condemnation in the case of the Immanuel (1): and the doctrines there laid down were most fully confirmed by the judgment of the court of appeal, in the case of the Wilhelmina (2). The judgment in this case was delivered by the Lord Chancellor, and it concluded in these decisive terms: "It has already been pronounced to be the opinion of this court, that, by the general law of nations, it is not competent in neutrals to assume, in time of war, a trade with the colony of the enemy which was not permitted in time of peace; and, under this general position, the court is of opinion that this ship and cargo are liable to confiscation."

The prohibition by which neutrals are forbidden to avail themselves of the relaxations extended by belligerents, reaches only to those cases where such relaxations did not exist in time of peace. Where the relaxation did exist in time of peace, its benefit is continued to the neutral during war; in accordance with the leading rule, which enjoins that war shall not place the neutral in a worse situation than that in which he would have found himself if peace had continued. And therefore, in the case of the Juliana (3), which was the case of a neutral vessel

(1) 2 Rob. Rep. 197.
(2) 4 Rob. Rep. Appendix, 4.
(3) 4 Rob. Rep. 321.

sailing between France and Senegal, then a French colony, the court having ascertained, after much investigation, that France had been accustomed to leave open the trade of Senegal to foreign ships, as well before as since the war, restored the vessel to the neutral claimants.

It was in the year 1756 that the strict rule, which we have been hitherto considering, was for the first time practically established and universally promulgated, the case which demanded its application having then for the first time occurred (1). It has therefore become generally known by the title of "the rule of the war 1756; by which every one understands the rule that neutrals are not to carry on, in time of war, a trade which was interdicted to them in time of peace (2)."

Relaxations of the Rule of 1756.

Having seen distinctly what is the strict measure of the belligerent's right, as comprised in the foregoing rule, we will now enquire what relaxations have been introduced by the more lenient policy of later times. These relaxations are comprehensively and clearly stated by Dr. Robinson in the Appendix to the 4th volume of his Reports. The following are the points of information most important to our present purpose.

"During the war between England and America, and the several powers of Europe that interfered to foment those differences, the principle was altogether intermitted—and on this ground, that France had professed, a short time before the commencement of hostilities, to have altogether abandoned the principle of monopoly, and meant, as a permanent regulation, to admit neutral merchants to trade with the French colonies in the West Indies. The event proved the falsehood of that representation: but, for a time, the effect was the same. The court of admiralty of this country did not, during that war, apply the principle, or interrupt the intercourse of neutral vessels in that branch of commerce more than in any other.

"Soon after the commencement of the late war, the first set of instructions that issued, were framed, not on the exception of the American war, but on the antecedent practice; and directed cruizers 'to bring in, for lawful adjudication, all vessels loaden

(1) 6 Rob. Rep. Appendix, note I. 4 Rob. Rep. Appen. 13.

(2) See observations on this rule. Baring on Orders in Council, 32, &c. 80. &c.

with goods, the produce of any colony of France, or carrying provisions or supplies for the use of any such colony.' The relaxations that have since been adopted, have originated chiefly in the change that has taken place in the trade of that part of the world, since the establishment of an independent government on the continent of America. In consequence of that event, American vessels had been admitted to trade in some articles, and on certain conditions, with the colonies both of this country and France. Such a permission had become a part of the general commercial arrangement, as the ordinary state of their trade in time of peace. The commerce of America was therefore abridged by the foregoing instructions, and debarred of the right generally ascribed to neutral trade in time of war, that it may be continued, with particular exceptions, on the basis of its ordinary establishment. In consequence of representations made by the American government to this effect, new instructions to our cruizers were issued on the 8th January 1794, apparently designed to exempt American ships, trading between their own country and the colonies of France. The directions were, 'to bring in all vessels loaden with goods the produce of the French West India islands, and coming directly from any port of the said islands to any port in Europe.'

" In consequence of this relaxation of the general principle, in favour of American vessels, a similar liberty of resorting to the colonial market for the supply of their own consumption, was conceded to the neutral states of Europe. To this effect, a third set of public instructions issued, 25th January 1798, which recite, as the special cause of further alteration, the present state of the commerce of this country, as well as that of neutral countries, and direct cruizers 'to bring in all vessels coming with cargoes the produce of any island or settlement belonging to France, Spain, or Holland, and coming directly from any port of the said islands or settlements, to any port of Europe, not being a port of this kingdom, nor a port of the country to which such ships, being neutral ships, belonged.'

" Neutral vessels were, by this relaxation, allowed to carry on a direct commerce between the colony of the enemy and their own country: a concession rendered more reasonable by the events of war, which, by annihilating the trade of France, Spain, and Holland, had entirely deprived the states of Europe

of the opportunity of supplying themselves with the articles of colonial produce in those markets. This is the sum of the general rule, and of the relaxations in the order in which they have occurred. On the effect and extent of the law to be extracted from the rule and the exceptions taken together, much argument has been displayed, and several important judgments have been delivered."

The illegality of the direct trade between the colony and the parent state of the enemy, was settled in the case of the Immanuel (1). A trade between the country of the enemy and the colony of his ally, was held, in the case of the Rose (2), to be upon the same footing; and in the case of the New Adventure (3), which was the case of a ship going from the French settlement of Goree to the Spanish colony of the Havannah, it was decided, that even this species of trade, though not at all connected with either parent state, but carried on simply from the settlement of one enemy to the colony of another, fell within the general principle of the rule, and was therefore unlawful to the neutral. These cases refer to principles of the original rule, which have never been relaxed by any instructions (4).

We next advance to the consideration of those cases which have arisen out of the instructions or relaxations just mentioned. The Danish ship Wilhelmina was taken on a voyage from a hostile colony to a port of Europe, which was not a port either of this kingdom or of the country to which the ship or cargo belonged. It was therefore considered as a case not falling within the protection of the instructions, and a condemnation ensued. In the case, indeed, of the Hector (5), and in the subsequent case of the Sally (6), the instructions appear to have been construed a little more favourably than their tenor dictated. Those were cases of American ships, captured on voyages from hostile colonies in the West Indies to another West Indian island, that of St. Thomas, which was then a neutral possession. The trade thus carried on by the American neutrals, was not to any port of this kingdom, nor to a port of their own country; and, upon principle, would therefore have been subject to confisca-

(1) 2 Rob. Rep. 186. Reeve's Shipping, 271.
(2) 4 Rob. Rep. App.
(3) 4 Rob. Rep. App.
(4) See 4 Rob. Rep. App.
(5) Hector, 4 Rob. Rep. App.
(6) Sally, ibid.

tion; but the instructions had directed the capture only of ships coming from the hostile colonies to Europe; and as this produce had not been carried out of the West Indies, it was restored, although it should seem that, even without any instructions at all, the trade was inherently illegal. However, it was thought right, at that time, to put a liberal interpretation on the instructions, and to consider as exempted, that which was not specifically included; though, in the Sally, the Court professed merely to act on the authority of the Hector, and intimated that, if the question had been a new one, their decision would have been different. In the case of the Lucy (1), an attempt was made by a neutral claimant to extend the indulgence still further. It was the case of a neutral Swedish vessel, taken on a voyage from a hostile colony to a neutral American port. Here, too, the adventure was certainly not pointed out for confiscation by the letter of the instructions; but the Court thought proper to decide upon the principle, which they did not conceive to have been in this instance relaxed by the instructions: and they therefore proceeded to condemnation. The Master of the Rolls pronounced judgment to the following effect: "In the case of the Sally, the Court thought they were going further than they should have been disposed to go, if it had not been for the authority of the Hector: now we are required to go farther. In neither of those cases was the produce of the colonies carried out of the West Indies. If an American vessel would not be permitted to trade from Saint Domingo to Sweden, there can be no reason why the same rule should not be applied to Swedish vessels, trading between the colony of the enemy and America."

On the other hand, in the case of the Margaretha Magdalena (2), which was the case of a ship captured on a voyage, bonâ fide, from a hostile colony to her own port, the protection of the instructions was held to be fairly applicable, and the property was restored. In the case of the Providentia (3), a vessel having been captured in a trade with a hostile colony, which trade, even in time of war, was not generally open to all neutrals, but permitted only to particular persons, by special passes or licences, it was contended on the part of the captors,

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(1) 4 Rob. Rep. App.
(2) 2 Rob. Rep. 138.
(3) 2 Rob. Rep. 142.

that the instructions were not meant to protect these adventures, but merely to exempt that trade which was generally open to all neutrals. But the court thought it proper to put a more liberal interpretation on the instructions: "If," said Sir William Scott, "a distinction was intended between cases of trade generally open, and cases in which a special licence or pass is necessary, that distinction ought to have been expressly inserted in the instructions, as an exception. There is nothing in the general terms to direct neutrals to such interpretation. It would be, therefore, to operate with surprize upon them, and to mislead them into a trade to their own undoing, to put such an interpretation upon the King's instructions. Unless it can be shewn that it was the particular meaning of the instructions to except vessels under this licence, I must hold, that it is not in the terms of them to enquire whether they are going with a pass or not. So I understand them, and till I am instructed to the contrary by the superior court, I shall so interpret them, as importing a general permission, and as not affected by the special licence; the law being simple and universal in its language, and there being nothing to lead me to think that there was any such reserve in the mind of the legislature."

But it is not possible, consistently with the justice which a belligerent nation owes herself, to exercise this liberality of interpretation towards neutrals in all cases. In that of the Rendsborg (1), a contract had been made between a neutral merchant and the Dutch East India company, with the avowed object of securing the Dutch property from English hostility. The adventure, it is true, was to Copenhagen, the port of the neutral merchant himself, and therefore, by the letter of the instructions, appeared to be legal: but the Court were of opinion, that a commerce, formed with such express views, facilitated as it was by the enemy with peculiar privileges, and conducted on so immense a scale, was not to be considered as a neutral traffic, though the property did really belong to the neutral merchants who claimed it. "It is a possible thing," said Sir William Scott, "that the commerce may not be neutral although the property is; and, if that is the case, the mere neutral ownership will not be a sufficient title to restitution: with respect to the avowed object of the enemy in entering into

(1) 4 Rob. Rep. 121.

the contract, namely, the view of preserving his property from British capture;" the learned judge proceeded to speak in the following terms: "It has been argued that the motive does not concern the buyers: that the motive of the sellers is nothing to the buyers, is laid down as a position, true in the most unlimited extent. I think that is advanced a little too largely; because if the motive is disclosed, it is possible that the duties of neutrality may, on the disclosure of such a motive, create some new obligations on the neutral purchaser, arising from his relation to the other belligerent; the grand fundamental duty of neutrality being, that he is not to relieve one belligerent from the infliction of his adversary's force, knowing the situation of affairs upon which the interposition of his act would have such a consequence. Neutrals may not be bound to enquire very accurately; but if it is clearly declared, either by the fact itself or *à fortiori* by express acknowledgments, they are bound to take notice of it and regulate their conduct accordingly. If one belligerent is in a state of distress, created by the superiority of his enemy, and on that account gives invitations to neutrals, for other pretended reasons, it is not necessary for me to say how far the neutral is bound to scrutinize the truth of those reasons, and to decline, in all cases, a beneficial invitation upon his own private surmises. But if a belligerent come and say, I am in the utmost distress; my enemy is all powerful; without your assistance, I am a lost man: in such a case, it is an invitation which he is manifestly not at liberty to accept. He cannot afford such assistance, without being guilty of a direct interposition in the war. Nor does it affect the justice of the case at all, that such assistance is not given gratuitously; though done *lucrandi causâ*, it is not less an unlawful interposition; a man does not send contraband out of pure love of the enemy, but with a view of obtaining advantage to himself, from the relief of the enemy's distress. If it is a sound principle of the law of nations, that you are not to relieve the distress of one belligerent to the prejudice of another, any advantage that you may derive from such an act will not make it lawful. The adversary has a full right to destroy his commerce. By his own confession the adversary is effecting this; he has the power, as well as the right, and you are not, from a prospect of advantage to yourself, or from any other motive, to step in, on every outcry for help, to rescue him from the gripe of his adversary."

Colonial Trade not to be carried on circuitously by Neutrals.

The colonial trade which a neutral may not carry on directly, he may not carry on circuitously; "an American," said Sir William Scott in the case of the Polly (1), "has undoubtedly right to import the produce of the Spanish colonies for his own use; and, after it is imported bonâ fide into his own country, he would be at liberty to carry it on to the general commerce of Europe." But then arises the question, what shall be considered a fair importation for the use of the neutral, and what shall be considered only a colourable importation to protect the enemy's adventures? So many cases had occurred where the importation from the hostile colony into the neutral country had been merely fraudulent, the produce being, in truth, hostile property covered by a neutral name, and destined for the mother country of such hostile colony, that it had become very difficult for the Court to decide, what species of importation should be deemed a fair and honest importation, sufficient to break the continuity of the voyage, and relieve the neutral from the suspicion of hostile collusion (2). The question at length was discussed, upon an appeal before the Lords Commissioners, in the case of the William (3); and the Master of the Rolls, in giving judgment, expressed himself to the following effect. "What with reference to this subject, is to be considered a direct voyage from one place to another? Nobody has ever supposed that a mere deviation from the straightest and shortest course in which the voyage could be performed, would change its destination and make it cease to be a direct one within the intendment of the instructions. Nothing can depend on the degree, or the direction of the deviation, whether it be of more or fewer leagues; whether towards the coast of Africa, or towards that of America. Neither will it be contended that the point, from which the commencement of a voyage is to be reckoned, changes as often as the ship stops in the course of it. Nor will it the more change, because a party may choose arbitrarily, by the ship's papers, or otherwise, to give the name of a distinct voyage to each stage of a ship's progress. The act of shifting the cargo from the ship to the shore, and from the shore back again to the ship, does not necessarily amount to the termination of one voyage, and the commencement of another. It may be wholly unconnected with

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(1) 2 Rob. Rep. 361. 1 Acton's Rep. 171.

(2) Polly, 2 Rob. Rep. 361 Maria, 5 Rob. 365.

(3) 5 Rob. Rep. 387.

any purpose of importation into the place where it is done. Supposing the landing to be merely for the purpose of airing or drying the goods, or of repairing the ship, would any man think of describing the voyage as beginning at the place where it happened to become necessary to go through such a process? Again, let it be supposed that the party has a motive for desiring to make the voyage appear to begin at some other place than that of the original lading, and that he therefore lands the cargo, purely and solely for the purpose of enabling himself to affirm, that it was at such other place that the goods were taken on board, would this contrivance at all alter the truth of the fact? Would not the real voyage still be from the place of the original shipment, notwithstanding the attempt to give it the appearance of having begun from a different place? The truth may not always be discernible; but when it is discovered, it is according to the truth, and not according to the fiction, that we are to give the transaction its character and denomination. If the voyage, from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have ended. That those acts have been attended with trouble and expense, cannot alter their quality or their effect. The trouble and expense may weigh as circumstances of evidence to shew the purpose for which the acts were done, but if the evasive purpose be admitted or proved, we can never be bound to accept, as a substitute for the observance of the law, the means, however operose, which have been employed to cover a breach of it. Between the actual importation by which a voyage is really ended, and the colourable importation which is to give it the appearance of being ended, there must necessarily be a great resemblance. The acts to be done must be almost entirely the same, but there is this difference between them: the landing of the cargo, the entry at the custom-house, and the payment of such duties as the law of the place requires, are necessary ingredients in a genuine importation: the true purpose of the owner cannot be effected without them. But, in a fictitious importation, they are mere voluntary ceremonies which have no natural connection whatever with the purpose of sending on the cargo to another market, and which, therefore, would never be resorted to by a person entertaining that purpose, except with a view of giving to the voyage, which he has resolved to continue, the appearance of being broken by an importation which he has resolved not really to make."

In consequence of some complaints of the conduct of our vice-admiralty court, on the part of America, an official correspondence took place between Lord Hawkesbury and Mr. King, in 1801, in the course of which the Advocate General, on the 16th of March in that year, in his official character, made the following report as to the law concerning the colonial trade: "The general principle respecting the colonial trade has, in the course of the present war, been relaxed to a certain degree in consideration of the present state of commerce. It is now distinctly understood, and has been repeatedly so decided by the high court of appeal, that the produce of the colony of an enemy may be imported by a neutral into his own country, and may be re-exported thence even to the mother country of such colony; and in like manner, the produce and manufacture of the mother country may, in this circuitous mode, legally find their way to the colony. The direct trade, however, between the mother country and its colonies has not, I apprehend, been recognised as legal either by his Majesty's government or by his tribunals. What is a direct trade, or what amounts to an intermediate importation into the neutral country, may sometimes be a question of some difficulty. A general definition of either, applicable to all cases, cannot well be laid down. The question must depend upon the particular circumstances of each case. Perhaps the mere touching in the neutral country to take fresh clearances may properly be considered as a fraudulent evasion, and is, in effect, the direct trade (1); but the high court of admiralty has expressly decided, (and I see no reason to expect that the court of appeal will vary the rules) that landing the goods and paying the duties in the neutral country, breaks the continuity of the voyage, and is such an importation as legalizes the trade, although the goods be reshipped in the same vessel, and on account of the same neutral proprietors, and be forwarded for sale to the mother country or the colony." It is said, that in case of the Essex, contrary to prior determinations, it was decided in the court of appeal, that if an American ship, which has exported goods from a French colony to America, and there only given bond for the payment of the duties instead of actually paying them, and then conveys the goods to France, this is decisively illegal, and subjects the cargo to capture and condemnation; a doctrine which it has been insisted, is contrary

(1) See 1 Acton's Rep. 171.

to legal principles (1). Upon the whole it should seem, that the genuineness of these adventures is a matter to be judged of, not by any definite and precise criterion, but by the particular circumstances of each particular case.

Breach of this Rule.

The penalty in these cases of colonial trade, as well as in the other cases of illegal commerce carried on by neutrals, is *confiscation*. It was for some time the custom that the ship should be restored, and the cargo alone confiscated; but in later times, the strictness of the original principle has been revived, and ship and cargo are both condemned. (2)

These are the chief regulations and decisions of a permanent nature, respecting the interference of neutrals with the enemy's colonial trade. I say, of a permanent nature, because it must be apprehended that their principles, being founded in natural justice and the established jurisprudence of nations, will be recurred to, and universally acknowledged by the neutral powers, at all times when neutrals will be permitted to acknowledge any principles at all in questions of international law. The decrees of France and the orders in council of Great Britain, and all those various inventions of aggression and retaliation which have abounded through the late war, do not appear to me to wear the same probability of permanence, adopted as they have been in particular emergencies, and calculated for individual objects.

What Interest of the Enemy in Property renders it liable to Confiscation.

Besides the coasting and colonial trades, there are some other commercial transactions, of a nature so liable to abuse, that belligerents have felt themselves justified in setting aside the claims which neutrals have preferred respecting them. In the case of the Marianna (3), a hostile ship, which had been bought of a neutral, this neutral put in a claim against the captors, suggesting that the purchase money had not been paid to him, and that he had therefore retained a lien upon the property for the payment of that money. But the Court said, " Such an interest cannot be deemed sufficient to support a claim of

(1) Baring on Orders in Council, 81, 2; but quære, if the case of the Essex was decided on this ground.

(2) Jonge Thomas, in a note to the report of the Minerva, 2 Rob. Rep. 229; and the Volant, note to the report of the Wilhelmina, 4 Rob. Append. 1 Acton's Rep. 171.

(3) 6 Rob. Rep. 24.

property in a court of prize. Captors are supposed to lay their hands on the gross tangible property on which there may be many just claims outstanding, between other parties, which can have no operation as to them. If such a rule did not exist, it would be quite impossible for captors to know upon what grounds they were proceeding to make any seizure. The fairest and most credible documents, declaring the property to belong to the enemy, would only serve to mislead them, if such documents were liable to be overruled by liens, which could not in any manner come to their knowledge. It would be equally impossible for the Court, which has to decide upon the question of property, to admit such considerations. The doctrine of liens depends very much on the particular rules of jurisprudence which prevail in different countries. To decide judicially on such claims, would require of the Court a perfect knowledge of the law of covenant, and the application of that law in all countries, under all diversities in which that law exists. From necessity, therefore, the Court would be obliged to shut the door against such discussions, and to decide on the simple title of property with scarcely any exceptions."

Of the same class is the case of the Josephine (1). Silver had been shipped by a hostile merchant to his agent in Hamburgh, for the purpose, as it was asserted, of satisfying a debt to an American neutral. The cargo was captured: and the American, for whose payment it was thus stated to have been destined, put in a claim in the British court of admiralty. The claim was disallowed: "For," said the Court, "even if the asserted intention on the enemy's part, of applying the silver to the payment of the neutral, were ever so sincere, it always remained revocable. The hostile merchant retained the power of converting it to any purpose of his own, and the neutral claimant had no document whatever, giving him the control over it. Under these circumstances, the hostile merchant must be taken to be the legal proprietor; and, as his property, this silver must be condemned."

Relaxations occasionally allowed

The belligerent, when he thinks fit, has of course a power to remit the strictness of any of his own rights, and such remissions are not unfrequently made by orders in council and royal instructions to the commanders of vessels, enjoining them

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(1) 4 Rob. Rep. 25.

to spare certain branches of trade in particular places, or for a particular time. Whenever these relaxations are afforded by the government, the Court of Admiralty shews itself uniformly liberal in their constructions. It will be unnecessary to multiply instances in order to illustrate this favourable temper in the judicial interpretation of public dispensations; one case will be amply sufficient. In the case of the Nostra Signora de Piedade (1.), instructions had been issued by the King in council, directing the commanders of ships not to molest neutral vessels laden solely with corn, and going to Spain, to whomsoever that corn might belong; the ship in question was not laden solely with corn, having on board, besides grain, a few dozen of oars and other insignificant articles; nor was she going to Spain, in the common acceptation of those words, but was captured in a voyage from one Spanish port to another. Sir William Scott gave judgment to the following effect: "The corn constitutes the cargo, and although there were on board some other small articles, they are not material, I think, to affect the privilege of the principal cargo, being corn, going under the humane permission of his Majesty to an enemy afflicted with famine and pestilence. At the same time it is objected, that this cargo does not come under the literal terms of the instructions which are described to be for the importation of corn, &c. But it would, in my opinion, be no more than the fair interpretation of the humane intention of these instructions, to consider them as extending as well to the distribution of corn between the provinces of Spain, as to an importation directly from any other country. Indeed, the indulgence would be in a great measure fruitless without this construction: if cargoes, on board neutral ships, are entitled to protection in coming from the north of Europe to the northern ports of Spain, they are to be protected also by the same spirit of the same instructions, in being distributed afterwards between the provinces of that kingdom. I am therefore disposed to hold this cargo entitled to protection, unless the privilege shall have been forfeited by any fraudulent or improper conduct; since every grant of this kind must be fairly and honourably acted upon; and if fraud is interposed, and the parties resort to subterfuges of ill faith for their protection, they may justly be considered to have forfeited all benefit from the special indulgence which has been granted to them."

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(1) 6 Rob. Rep. 41.

Suspension of the Rights of Neutrals.

We now arrive at the view of those cases where the law of nations, in consideration of the urgent necessities of war, permits the suspension of some of the absolute rights of neutrals. The absolute rights of neutrals may be summed up in the terms of that rule which has been before mentioned, " that a neutral is not to be placed in a worse situation by the war, than that in which he would have remained if peace had continued uninterrupted." To this rule of absolute right the urgent necessities of war form the only exception.

Forcible Employment of Neutral Ships, &c.

" By virtue of these urgent necessities of war, vessels are frequently detained," says Beawes, in his Lex Mercatoria, " to serve a prince in an expedition; and, for this, have often their lading taken out, if a sufficient number of empty ones are not procurable to supply the state's necessity: and this without any regard to the colours they bear, or whose subjects they are; so that it frequently happens, that many of the European nations may be forcibly united in the same service, at a juncture when most of their sovereigns are at peace and in amity with the nation which they are obliged to serve. Some have doubted of the legality of the thing; but it is certainly conformable to the law both of nature and nations, for a prince, in distress, to make use of whatever vessels he finds in his ports, that are fit for his purpose, and may contribute to the success of his enterprises; but under this condition, that he makes them a reasonable recompence for their trouble, and does not expose either the ships or men to any loss or damage."

" In the law of dominion," says Molloy (1), " extreme necessity seems excepted; hence it is, that the vessels and ships, of what nature and nation soever, that should be found riding in the ports or havens of any prince or state, may be seized on and employed upon any service of that sovereign that shall seize the same; being but a harmless utility, not divesting the owners of their interest or property." After putting a case on this point, he proceeds: " Who would not pluck a shipwrecked man from his plank, or a wounded man from his horse, rather than suffer himself to perish? To slight which, is a sin, and to preserve, the highest wisdom. Besides, in the taking of the vessel, the right is not taken from the owner, but only the use, which, when the necessity is over, there is a condition of re-

(1) Molloy, b. 1. ch. 6. sec. 1 and 2.

storing annexed tacitly to such a seizure. And, doubtless, the same right remains to seize the ships of war of any nations, as well as those of private interest, the which may be employed as occasion shall present. So the Grecians seized on ships of all nations that were in ports, by the advice of Xenophon; but in the time, provided food and wages to the mariners."

But these are nice points cf casuistry, which few will submit to have settled for them, by the reasonings of their neighbours. But surely nothing but a necessity, really and absolutely the most perilous and extreme, can authorise such invasions of neutral right. For, if the calls of convenience or passion are to be interpreted into the dictates of necessity, (a species of interpretation too common, both with public and with private men), the laws of security and property are a dead letter, and the only law is the law of the strongest. The great danger consists in this; that, of the necessity which is set up as the excuse, the interested party must be himself the judge; and having only his own conscience to consult as to its existence, he is but too apt to persuade himself, that it is the same thing to possess the power, and to labour under the necessity. The mode in which this suspension of neutral right is most usually and commodiously made, is that of embargo; and this species of civil embargo, which is always attended with compensation to those whose ships are attacked by it, is distinguishable from that kind of warlike embargo, which we have before explained to be a mode of seizing the property of enemies.

Of Visitation and Search, and Consequences of Resistance. (1)

The rights of a belligerent nation against the delinquencies of neutrals would exist in vain, if she were not armed with a practical power, by which those rights may be enforced. Such a power, by the law of nations, regularly exists; and it is called the power of visitation and search. "We cannot prevent the conveyance of contraband goods," says Vattel (2), "without searching neutral vessels that we meet at sea. We have, therefore, a right to search them." This is clear and satisfactory. If, upon making this search, the vessel be found employed in contraband trade, or in carrying dispatches or troops, or in any other illegal commerce, she is brought in for

(1) As to the right of visitation and search, see the celebrated Letter of the Duke of Newcastle to Persian Secretary, A. D. 1752. 1 Collect. Jurid. 138. and Halliday's Life of Ld. Mansfield.

(2) Vattel, b. 3. ch. 7. s. 114.

adjudication in the court of admiralty. If, on the other hand, her commerce appear to be legitimate, she is dismissed without further molestation or inconvenience.

Neutrals have made many struggles against this right of visitation and search, and particularly by the celebrated league, which was formed during the American war, with the Empress of Russia at its head. A declaration, dated the 28th of February, 1781 (1), was delivered to the minister of each of the belligerent powers, purporting "that neutral ships ought to be at liberty to navigate freely from port to port, and upon the coast of the nations of war; that the goods and effects of the subjects of the belligerent powers should be free, with the exception of contraband goods; that no goods should be considered as a contraband, but such as were specified in the 10th and 11th articles of the treaty of commerce between Russia and Great Britain, dated 20th of June 1766; that to ascertain what should be deemed a blockaded port, it was determined that none should be admitted to come within that description, but such only, where by reason of the near approach of the ships employed in the attack, there was an apparent danger that they would be able to enter it; and finally, that these principles should serve as a basis for all proceedings and judgments upon the legality of prizes."

The right of visitation and search was not strictly enforced by Great Britain under these circumstances; but it was not abandoned. Similar attempts, subsequently made, have been defeated and totally overthrown; and the right, at this day, subsists practically as well as theoretically. Such opposition (illegal according to the soundest principles of international jurisprudence) is adverted to in terms of strong disapprobation, by three of the judges in the case of Garrels v. Kensington (2).

The whole international law upon this subject is admirably summed up by Sir William Scott, in his judgment on the case

(1) Marshall on Insurance, b. 1. ch. 8. sec. 5.

(2) Garrels v. Kensington, 8 T. R. 230. See also Lord Erskine's speech, 8th March 1808, upon the Orders in Council, 10 Cobbett's Parl. Deb. 955. Mr. Baring observes in his Work upon the Orders in Council, page 102, that the pretensions to a right to search a national ship for any thing, appears generally exploded and renounced by all parties.

of the Maria (1), where he establishes three important points, which follow: first, that the right of visiting and searching merchants ships, upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestable right of the lawfully commissioned cruizers of a belligerent nation. "I say, be the ships, the cargoes, and the destinations what they may; because, till they are visited and searched, it does not appear what the ships, or the cargoes, or the destinations are; and it is for the purpose of ascertaining these points, that the necessity of this right of visitation and search exists." The second point is, that the authority of the sovereign of the neutral country being interposed in any manner of mere force, cannot legally vary the rights of a lawfully commissioned belligerent cruiser: "Two sovereigns may unquestionably agree, if they think fit, as in some late instances they have agreed, by special covenant, that the presence of one of their armed ships along with their merchant ships shall be mutually understood to imply, that nothing is to be found in that convoy of merchant ships inconsistent with amity or neutrality; and if they consent to accept this pledge, no third party has a right to quarrel with it, any more than with any other pledge which they may agree mutually to accept. But surely no sovereign can legally compel the acceptance of such a security by mere force. The only security known to the law of nations upon this subject, independent of all special covenant, is the right of personal visitation and search, to be exercised by those who have the interest in making it." The third point is, that the penalty for the violent contravention of this right, is the confiscation of the property so withheld from visitation and search. "I stand with confidence upon all fair principles of reason, upon the distinct authority of Vattel, upon the institutes of other great maritime countries, as well as those of our own country, when I venture to lay it down, that, by the law of nations, as now understood, a deliberate and continued resistance to search, on the part of a neutral vessel to a lawful cruiser, is followed by the legal consequence of confiscation."

A rescue effected by the crew, after capture, when the captors are in actual possession, is considered a resistance within the application of the penalty: "For a rescue," said Sir William Scott,

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(1) 1 Rob. Rep. 340. See also 1 Edwards's Rep. 208.

in the case of the Dispatch (1), can be nothing else than, as the very term imports, a delivery from force by force. In the case of the Elsabe (2), it is laid down as settled, that the resistance of the convoying ships is the resistance of the whole convoy; whence it follows, that in such cases the whole convoy is subject to confiscation. But from the case of the Pennsylvania (3), it appears, that if a neutral vessel has been captured, and the captors, whether from want of hands to navigate her, or for the sake of making other prizes, or from any other motive, allow the neutral commanders to resume the direction of the vessel, without any express agreement binding those commanders to bring her in for adjudication in pursuance of the original capture, then the escape of the neutral will not be regarded as a rescue or a resistance. On the same principle it was said by the court, that in the case of the Saint Juan Baptista (4), that a mere attempt to escape before any possession assumed by the captor, does not draw with it the consequences of condemnation. And the same case further establishes, that, unless the neutral vessel have reasonable grounds to be satisfied that a war has actually broken out, even a direct resistance will not superinduce the penalty: for, without a war, there is no such thing as a neutral character, nor any foundation for the several duties which the law of nations imposes on that character. Nor has the penalty been deemed to attach in those instances where a disposition to resistance has at first been betrayed, but afterwards abandoned without being actually carried into operation (5). In the case of the Mentor (6), Sir William Scott said, "As to the instructions that were given to the master of an American ship by his employers, directing him not to speak to any British cruiser, it must be understood, that every commissioned cruiser has an undoubted right of inquiring, and it is not the arbitrary decrees of the other belligerent that can abrogate it. On strict principle, to defeat that right by evasion might be as penal as to resist it by force, though it has not been so held in practice; but certainly it is conduct which is always to be viewed with jealousy, and cannot be set up as an excuse, advantageous to the parties, in any matter requiring explanation of their conduct." Where the penalty attaches

(1) 3 Rob. Rep. 278.
(2) 4 Rob. Rep. 408.
(3) 1 Acton, 33.
(4) 5 Rob. Rep. 33.
(5) Maria, 1 Rob. Rep. 340. Elsabe, 4 Rob. Rep. 409. Catharina Elizabeth, 5 Rob. Rep. 232.
(6) 1 Edwards, 208.

at all, it appears to attach to the cargo as completely as to the ship: "If a neutral master," said Sir William Scott, in the case of the Catharina Elizabeth (1), "attempts a rescue, he violates a duty which is imposed upon him by the law of nations, to submit to come in for inquiry as to the property of the ship or cargo; and if he violates that obligation by a recurrence to force, the consequence will undoubtedly reach the property of his owner; and it would, I think, extend also to the confiscation of the whole cargo intrusted to his care, and thus fraudulently attempted to be withdrawn from the rights of war."

Papers and Documents requisite on board a Neutral Vessel. (2)

When the right of visitation and search is exercised upon a neutral vessel, the first object of inquiry is generally the ship's papers. The following are the papers and documents which are usually required by way of evidence of a vessel's neutral character, and which are therefore expected to be uniformly found on board:

1. The passport. This is a permission from the neutral state to the captain or master of the ship to proceed on the voyage proposed, and usually contains his name and residence, the name, description, and destination of the ship, with such other matters as the practice of the place requires. This document is indispensably necessary for the safety of every neutral ship. Hubner says, that this is the only paper that is rigorously insisted upon by the Barbary corsairs, by the production of which alone, their friends are protected from insult.

2. The sea letter, or sea brief, which specifies the nature and quantity of the cargo, the place from whence it comes, and its destination. This paper is not so necessary as the passport, because that, in most particulars, supplies its place.

3. The proofs of property, which ought to shew that the ship really belongs to the subjects of a neutral state. If she appear to either belligerent to have been built in the enemy's country, proof is generally required that she was purchased by the neu-

(1) 5 Rob. Rep. 232.

(2) As to ships documents, see observations in Norman v. Kettlewell, 16 East. 186. and Duke of Newcastle's Letter to Prussian Secretary, A. D. 1752. 1 Collect. Jurid. 135. and Halliday's Life of Ld. Mansfield. As to clearance of ship, see Carruthers v. Gray, 15 East, 37. A *register* is not a document required by the law of nations, as expressive of a ship's national character. Le Cheminant v. Pearson, 4 Taunt. 367.

tral before, or captured and legally condemned since, the declaration of war; and in the latter case, the bill of sale, properly authenticated, ought to be produced. Even Hubner admits that these proofs are so essential to every neutral vessel, for the prevention of frauds, that those which sail without them will have no reason to complain if they are interrupted in their voyages, and their neutrality even disputed.

4. The muster roll, which the French call *role d'equipage*, contains the names, ages, quality, place of residence, and, above all, the place of birth, of every person of the ship's company. This document is of great use in ascertaining the ship's neutrality. It must naturally excite a violent suspicion, if the majority of the crew be found to consist of foreigners; still more, if they be natives of the enemy's country.

5. The charterparty. This instrument serves to authenticate many of the facts, on which the proof of the ship's neutrality must rest, and is therefore extremely necessary.

6. The bill of lading, by which the captain acknowledges the receipt of the goods specified therein, and promises to deliver them to the consignee, or his order. Of this there are usually several duplicates; of which one is delivered to the captain, one kept by the shipper of the goods, and one transmitted to the consignee. This instrument being only the evidence of a private transaction between the owner of the goods and the captain, does not carry with it the same degree of authenticity as the charterparty.

7. The invoices, which contain the particulars and prices of each parcel of goods, with the amount of the freight, duties, and other charges thereon, which are usually transmitted from the shippers to their factors or consignees. These invoices prove by whom the goods were shipped, and to whom consigned. They carry with them, however, but little authenticity, being easily fabricated, where fraud is intended.

8. The log-book, or ship's journal, which contains an accurate account of the ship's course, with a short history of every occurrence during the voyage. If this be faithfully kept, it will throw great light on the question of neutrality. If it be in any respect fabricated, this may, in general, be easily detected.

9. The bill of health, which is a certificate, properly authenticated, that the ship comes from a place where no contagious distemper prevails, and that none of the crew, at the time of her departure, were infected with such distemper. This bill of health is generally found on board of ships coming from the Levant, or from the coast of Barbary, where the plague so frequently prevails. (1)

Upon the subject of the ship's documents, it is to be observed, that, though by the law of nations, the want of some of these papers may be taken as strong presumptive evidence, yet the want of none of them amounts to conclusive evidence against a ship's neutrality. (2)

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(1) As to bill of health, see Levi v. Costerton, Holt's C. N. P. 167. Beawes, Lex Mer. 6 ed. 1 vol. 369. Pope on Customs, title 7.

(2) 8 Term Rep. 434. 437. 562. Le Cheminant v. Pearson, 4 Taunt. 367. Mayne and Webber, Parke, 363.

CHAP. X.

Of the Dispensations with the legal Effect of War upon the Commerce of Belligerents and Neutrals, by Passports, Licences, Orders in Council, and Temporary Statutes. (1)

HAVING, in the preceding chapters, considered the legal effect of war upon the commerce of belligerents, prohibiting all trading between them, and the reciprocal right of capturing each other's property, and how far neutrals are affected by the hostilities that exist between other powers; we will, in this chapter, consider those dispensations, with the exceptions, by virtue of proclamations, letters of passport, licences, and orders in council, founded either on the King's prerogative, or on some act of parliament. We have several times had occasion incidentally to observe, that, notwithstanding the general prohibition, it has been the custom to grant dispensations from the general rule in peculiar circumstances of policy or hardship. These dispensations are sometimes general, extending to a whole class of cases; and sometimes particular, affecting only individual adventures. The general dispensations are of two descriptions—by the permission of the King, and by acts of parliament. The first are usually issued in council, and vary, of course, from time to time with the exigencies of the state. The acts of parliament for temporary purposes of public convenience are passed from time to time, usually to last till the termination of the war, or for some other more definite period, and by which the general strictness of the commercial code, and more particularly of the navigation law, is for a while suspended. The dispensations of a particular nature, are chiefly of two kinds, passports and licences. We will *first* consider those dispensations which the King, by virtue of his prerogative, may grant; and *secondly,* those founded on particular acts of parliament.

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(1) See division of the subject, ante 377.

The King is usually denominated the arbiter of commerce (1). The King, with the advice of his council, has the right of regulating the commerce of this kingdom, except where there have been particular provisions made by statute, over which he has no authority (2) It was formerly a doctrine generally prevalent, that the proclamations of the King were of equal force with the statute law; and an enactment declaratory of the principle thus assumed was passed in the year 1539 (3). This statute, which was enforced by 34 & 35 of H. 8. c. 23. declared, that the King, with the advice of his council, might set forth proclamations under such penalties and pains as should seem necessary, which should be observed as if they were made by act of parliament; and though there was a proviso, that this should not be prejudicial to any person's inheritance, offices, liberties, chattels, or life, yet that reservation was little better than a nullity, when the statute immediately proceeded to enact, that whosoever should willingly offend against any article contained in the said proclamations, he should pay such forfeitures, or be so long imprisoned, as should be expressed in the said proclamations; and that if any offender should depart the realm to avoid answering the offence, he should be adjudged a traitor. Happily, however, these provisions no longer exist to disgrace the code of British jurisprudence. If they had continued, the constitution, of which we are now so proud, would be but one degree removed from an absolute despotism; and the Parliament, instead of enjoying the exclusive right of legislation, would possess but a legislative power concurrent with that of the King in his sole capacity (4). This obnoxious act was formally repealed in the commencement of the reign of Edward VI. (5); and at this day, especially since the 1 W. & M. sess. 2. c. 2., the prerogative of the King, with regard to proclamations and other acts, extends only where it does not interfere with the statutes, or the common law of the land (6); and in Coke's Reports (7), it is said, that the King cannot, by his proclamation, make a thing unlawful which was before lawful, and therefore nothing will be punishable after proclamation

1. Of Dispensations by the King's Prerogative.

Proclamations, &c.

(1) 1 Bla. Com. 273.

(2) 2 East, 296. 1 Taunt. 227.

(3) 31 H. 8. c. 8. & see Thomas v. Sorrell, Vaughan 345.

(4) 4 Hume Hist. 196, 7. 6 Hume Hist. 52.

(5) 1 Edw. 6. c. 12.

(6) 12 East, 296. 1 Taunt. 227.

(7) 12 Co. 75.; but see Hob. 251. Bac. Ab. Prerogative, p. 549. 4 Mod. 179. 11 East, 138.

which was not so before (1). But with this limitation, there is still left to the King a very extensive power. He may, by virtue of his prerogative, declare war or make peace; may grant letters of marque and reprisal, and licences dispensing with the rigour of war, passports and letters of safe conduct (2). He may promulgate blockades according to his direction of the national force; he may also make new declarations of contraband, when articles come into use as implements of war, which were before innocent; he may relax from the utmost rights of war, and from its extreme severities (3). What is termed the war prerogative of the King is created by the perils and exigencies of war for the public safety, and by its perils and exigencies is therefore limited. The King may lay on a general embargo, and may do various other acts growing out of sudden emergencies; but in all these cases the emergency is the avowed cause, and the act done is as temporary as the occasion; the King cannot change, by his prerogative of war, either the law of nations or the law of the land, by general and unlimited regulations. (4)

Of Passports and Safe Conducts. (5)

With respect to passports and safe conducts, it is observable that the subject of a king in amity may in general, and subject to the regulations under the alien acts, come into this kingdom without licence or safe conduct (6); but no subject of a king in enmity with the king of England, can come into the kingdom without the king's licence and safe conduct. *Safe conducts*, according to divers ancient statutes, must have been granted under the king's great seal and enrolled in chancery, or else were of no effect; the king being supposed the best judge of such emergencies as may deserve exception from the general law of arms. But *passports* under the king's sign manual, or licences from his ambassadors abroad, are now usually obtained, and are allowed to be of equal validity (7); and the violation of the protection afforded

(1) Chalmers, Col. Op. vol. 2. 244. Com. Dig. Prerogative, D. 3, 4.

(2) Com. Dig. Prerogative.

(3) Lord Erskine's speech, March 8, 1808, on Orders in Council, 10 Cobbett's Parl. Deb. 958, 9.

(4) Lord Erskine's speech, March 8, 1808, on the Orders in Council, 10 Cobbett's Parl. Deb. 961.

(5) As to these in general, see Beawes, Lex Mer. 6 ed. 394. Com. Dig. Prerogative, B. 5. Jacob's Law Dict. titles "Passport, Safe Conducts;" and Postlew. Dict. and Montefiori's Dict. same titles. Pardessus, 3 tom. 269.

(6) Calvin's Case, 7 Co. 21 *b*. As to alien regulations, see ante, 143, 4.

(7) 1 Bla. C. 7. page 252. 1 Beawes 394. Vatt. 416. Cobbett's St. Trials, vol. 2. 583. Com. Dig. Prerogative, B. 5.

by letters of safe conduct or by a passport, is a contempt of the king's authority, and punishable as a misdemeanor. (1)

The term *passport*, says Vattel (2), is used on ordinary occasions when speaking of persons who lie under no particular exception as to passing and repassing in safety, and to whom it is only granted for greater security, and in order to prevent all debate, or to exempt them from some general prohibition. A safe conduct is given to those who otherwise could not safely pass through the places where he who grants it is master; as for instance, to a person charged with some misdemeanor, or to an enemy (3). Of *safe conducts*, Vattel expresses himself to the following effect (4): "All safe conducts, like every other act of supreme command, emanate from the sovereign authority; but the prince may delegate to his officers the power of granting safe conducts, and they are invested with that power either by an express commission, or by a natural consequence of the nature of their functions. A general of an army, from the very nature of his post, can grant safe conducts, and as they are derived, though mediately from the sovereign authority, the other generals or officers of the same prince are bound to respect them. The person named in the safe conduct cannot *transfer* his *privilege* to another; for he does not know whether it be a matter of indifference to the grantor of the safe conduct, that another person should use it in his stead; and so far from presuming *that* to be the case, he is even bound to presume the contrary, on account of the abuses which might thence result; and he cannot assume to himself any farther privilege than was intended for *him*. If the safe conduct is granted, not for *persons*, but for certain *effects*, those effects may be removed by others besides the owner. The choice of those who remove them is indifferent, provided there do not lie against them any personal exception, sufficient to render them objects of just suspicion in the eye of him who grants the safe conduct, or to exclude them from the privilege of entering into his territories. He who promises security by a safe conduct, promises to afford it, whenever he has the command; not only in his own territories, but likewise in every place where any of his troops may happen to be; and

(1) Com. Dig. Prerogative, B. 3. E. 8. 4 Bla. Com. 68, 9.

(2) Vattel, b. 3. c. 17. s. 265.

(3) Several of the points relating to Safe-conducts are applicable also to Licences. See Vattel, b. 3. ch. 17. s. 266.

(4) Vatt. b. 3. ch. 17. s. 266.

he is bound not only to forbear violating that security either by himself or his people, but also to protect and defend the person to whom he has promised it, to punish any of his subjects who have offered him violence, and oblige them to make good the damage. As the right arising from a *safe conduct* proceeds entirely from the will of him who grants it, that will is the standard by which the extent of the right is to be measured; and the will is discoverable in the object for which the safe conduct was granted; consequently, a person who has barely obtained permission *to go away*, does not then derive a right to come back again; and a safe conduct granted for the simple *passage through* a country, does not entitle the bearer to *repass* through it *on his return*. When the safe conduct is granted for a particular business, it must continue in force until that business is concluded, and the person has had time to depart; if it is specified to be granted for a journey, it will also serve for the person's return, since both passage and return are included in a journey. As this privilege consists in the liberty of going and coming in safety, it differs from a permission to *settle* in any particular place, and consequently cannot give a right to stop any where for a length of time, unless on some special business, in consideration of which the safe conduct was asked and granted. A safe conduct given to a traveller naturally includes his baggage or his clothes, and other things necessary for his journey, with even one or two domestics, or more, according to the rank of the person. But in all these respects, as well as in the others which we just noticed, the safest mode, especially when we have to do with enemies or other suspected persons, is to specify and distinctly enumerate the particulars, in order to obviate every difficulty; accordingly, such is the practice which at present prevails; and in granting safe conducts, it is the custom expressly to include the baggage and domestics. A safe conduct given for a stated term expires at the end of the term specified therein, and the bearer, if he does not retire before that time, may be arrested and even punished according to circumstances, especially if he has given room for suspicion by an affected delay; but if forcibly detained, as by sickness, so as to be unable to depart in time, a proper respite should be allowed him; for a promise of security has been made to him, and though it was made only for a limited time, it is not, by any fault of his own that he has been prevented from departing within the term. The case is different from that of an enemy coming into our country during a truce; to the latter we have made no particular promise; he at

his own peril takes advantage of a general liberty, allowed by the suspension of hostilities. All we have promised to the enemy, is to forbear hostilities for a certain time, and at the expiration of that term it is a matter of importance to us, that we be at liberty to let the war freely take its course, without being impeded by a variety of excuses and pretexts. The safe conduct does not expire at the decease or deposition of him who granted it; for it was given in virtue of the sovereign authority, which never dies, and whose efficacy exists independent of the person entrusted with the exercise of it. It is with this act as with *other ordinances* of the public power; their validity or duration does not depend on the life of him who enacted them, unless by their very nature, or by express declaration, they are personally confined to him. The successor nevertheless may revoke a safe conduct if he has good reasons for the revocation; even he who has granted it may on like case revoke it, nor is he always obliged to make known his reasons. Every privilege when it becomes detrimental to the state may be revoked; a *gratuitous* privilege, purely and simply; a *purchased* privilege, on giving an indemnification to the parties concerned. But a safe conduct is not to be converted into a snare; if it be revoked, the bearer must be allowed time and liberty to depart in safety. If he, like any other traveller, be detained for some time in order to prevent his carrying intelligence to the enemy, no ill-treatment is to be offered him, nor is he to be kept longer than while the reasons for his detention subsist. If a safe conduct contains this clause, 'for such time as we shall think fit,' it gives only a *precarious* right, and is revocable every moment; but until it has been expressly revoked, it remains valid. It expires on the death of him who gave it, who from that moment ceases to will the continuation of the privilege; but it must always be understood, that when a safe conduct expires in this manner, the bearer is to be allowed a proper time for his safe departure." Safe conducts are more usually granted by land, *licences* by sea.

There is a peculiar description of protection called a *Mediterranean pass*, which, as it materially affects a considerable branch of our commerce, by protecting British vessels from the depredations of the piratical cruisers of the States of Barbary, Mediterranean Passes. (1)

(1) See History of this Protection, 2 Reeves 406. Macpherson's Ann. Com. vol. 3. 412. 593. 4 Anders. Hist. Com. 70. Pope, title 23. Beawes, Lex Mer. 6 ed. 394, 5.

here deserves more particular notice. The nature of a Mediterranean pass has been thus explained (1): "In the treaties that have from time to time been made with the different Barbary States, it has been agreed that the subjects of the king of Great Britain should pass the seas unmolested by the cruisers of those states; and for better ascertaining what ships and vessels belong to British subjects, it is provided that they should produce *a pass* under the hand and seal of the lord high admiral, or the lords commissioners of the admiralty. In pursuance of these treaties, passes are made out at the admiralty, containing a very few words written on parchment, with ornaments at the top, through which a scolloped indenture is made; the scolloped tops are sent to Barbary, and being put in possession of their cruisers, the commanders are instructed to suffer all persons to pass who have passes that will fit these scolloped tops. The protection afforded by these passes is such that no ships which traverse the seas frequented by these rovers ever fail to furnish themselves with them, whether in the trade to the East Indies, Africa, or the Levant, or in the trade to Spain, Italy, or any part of the Mediterranean; and from the more particular need of them in the latter, they no doubt obtained the name of *Mediterranean passes*. For the accommodation of merchants in distant parts, blank passes, signed by the lords of the admiralty, are lodged with the governors abroad, and with the British consuls, to be granted to those who comply with the requisites necessary for obtaining them. As this piece of security is derived wholly from the stipulations made by the Crown with a foreign power, the entire regulation and management of it has been under the direction of his Majesty, who with the advice of his privy council has prescribed the terms and conditions upon which these passes shall be granted. Among others are the following; they are to be granted for none but British-built ships, or ships made free, navigated with a master and three-fourths of the mariners British subjects, or foreign protestants made denizens. Bond is to be given in £300 if the vessel is under one hundred tons, and in £500 if it is of that or more, for delivering up the pass within twelve months, unless in the case of ships trading from one foreign port to another, and such passes need not be returned in less than three years. The rules and orders under which Mediterranean passes are now granted were made by the King in council, on 14th June 1722,

(1) Reeves, 2 ed. 406.

and on 28th August 1776, upon representations made by the board of admiralty of the abuses then practised. It has been found expedient at the conclusion of a war, and sometimes during a peace, to recal and cancel all passes that have been issued, and to issue others in a new form. This has been done for two reasons: *First*, that these useful instruments, by various means, either accidental or fraudulent, came into the hands of foreigners, who, under cover of them, carried on in security a trade which otherwise would belong to British subjects, and which had been purchased by the Crown at the expence of keeping up this sort of alliance: *Secondly*, that the Barbary States complained that adhering to the rule of fitting the other part of the indenture to the passes, they were obliged to suffer ships to pass that did not belong to British subjects. For these reasons the passes were called in, in the years 1722, 1729, 1750, 1765, 1776, 1783, and in 1802, and new ones issued. By 4 G. 2. c. 18. it is made felony without benefit of clergy (1) to forge, counterfeit, or alter, or utter false Mediterranean passes; and such offences committed out of the kingdom may be prosecuted in any country.

Of Licences, and how construed.

With respect to *licences*, it was observed by Sir William Scott, that "it is indubitable that the King may, if he pleases, give an enemy liberty to import; he may, by his prerogative of declaring peace and war, place the whole country of Holland in a state of amity; and *à fortiori*, he may exempt any individual from the operation of a state of war." (2) But the licence to *enable an enemy* to import goods must be express, for an enemy will not be protected by a general licence (3); and it has been held that a licence to certain named British subjects, on behalf of themselves and others, will not legalize an export of the goods of an alien enemy (4); and it has not been usual to grant licences to an enemy (5). However, the court of Common Pleas held that under a licence to a British merchant by name, in behalf of himself and others, to export goods to P. and to import a cargo

(1) But now with benefit of clergy, 52 Geo. 3. c. 143. s. 1. Pope, title 25.

(2) Per Sir Wm. Scott, in Hoffnung's case, 2 Rob. Rep. 162.; see also 1 Acton's Rep. 313. 322. 328. and per Lord Ellenborough, in Mennett v. Bonham, 15 East, 493.

(3) 1 Acton's Rep. 313. 322. 328.

(4) Mennett v. Bonham, 15 East, 477.; but see Feise v. Bell, 4 Taunt. 4. Hagedom v. Reid, 1 M. & S. 567. De Tastet v. Taylor, 4 Taunt. 233.

(5) Phillimore, 2 edit. 9. in notes, and Preface xx. xxi.

thence, an alien enemy may lawfully be interested in the export cargo, as well as the import cargo (1); and it was decided in the King's Bench, that a licence to J. H. of London, merchant, on behalf of himself and British or neutral merchants, to import a cargo from certain limits within which an enemy's port is situate, in any vessel bearing any flag except the French, will protect ships trading from that port in which ships I. H. and an alien enemy are jointly interested, and that therefore such interest was insurable (2). The right of granting these licences is established by the common law (3); and in the case of Vandyck v. Whitmore (4), Lord Ellenborough said, though the King may, at common law, licence a trading with an enemy's country, yet he may also qualify his license; in which case the parties seeking to protect themselves under it must conform to its regulations. The nature of these licences is clearly explained, and certain rules for their construction most ably laid down, in the case of the Cosmopolite (5), where Sir William Scott said, "A licence is a high act of sovereingty; an act immediately proceeding from the sovereign authority of the state which is alone competent to decide on all the considerations of commercial and political expediency, by which such an exception from the ordinary consequences of war must be controuled. Licences being then high acts of sovereignty, they are necessarily *stricti juris*, and must not be carried farther than the intention of the great authority which grants them may be supposed to extend. I do not say that they are to be construed with pedantic accuracy, or that every small deviation should be held to vitiate the fair effect of them. An excess in the quantity of goods permitted might not be considered as noxious to any extent. A variation in the quality or substance of the goods might be more significant, because a liberty assumed of importing one species of goods under a licence granted to import another, might lead to very dangerous abuses. In several cases of licences, this court has had occasion to observe, that articles have been introduced which might interfere with our own manufactures; not merely raw materials for the necessary employment of the skill and labour of British artisans, but the finished productions

(1) Feise v. Bell, 4 Taunt. 4.

(2) Hagedon v. Reid, 1 M. & S. 567. id. 217. 220; and see Hullman v. Whitmore, 3 M & S. 337., in which all the authorities were considered.

(3) 2 Roll. Abr. 173. pl. 3.; and 8 Term. Rep. 550. Com. Dig. Prerogative.

(4) 1 East, 475.

(5) 4 Rob. Rep 11.

of foreign industry and art, which might come in competition with those of our own; and it has been observed, not without surprise, that some licences themselves have given a countenance to this practice. Where the licences have expressly permitted the introduction of such goods, this court cannot take upon itself to withhold from the individual the benefit of such licences, however obtained; but it will always consider it to be its duty to look to the licence for the enumeration of the goods that are to be protected by it. In the present case it appears, that the terms of the licence have not been followed in this respect. Here is a licence for barilla, wool, liquorice, orchilla wood, and dying wood; yet there are other articles, a considerable quantity of wine and some hides on board. It is said that these, comparatively with the burthen of the vessel, form but a very trifling part of the cargo. Be the quantity what it may, it ought to have been provided for in the enumeration which the merchant submitted to the discretion of government when he applied for his licence. As it now stands, I must consider this part of the cargo as totally denuded of any authority 'under the licence, and therefore subject to condemnation.' The same point, as to the nature of the articles constituting the cargo, was again decided in the case of the Vriendschap (1). The question turned upon a quantity of barilla sent from London to Rouen; the claimants had obtained a licence to export certain enumerated articles thither, but barilla was not included in that licence: Sir William Scott condemned it. "The shipper," said he, "obtains a licence, which is a thing *stricti juris*, to be obtained by a fair and candid representation, and to be fairly pursued. Is this a fair execution of the licence? I cannot think it is. It is certainly a good logical rule, not to argue *ab abusu contra usum*; but if it is clear that the abuse would be certain and frequent, and impossible to be prevented in numerous cases which must occur, then the abuse so probable, certain, and frequent, is a fair argument against the allowance of the practice. If the Court is convinced, that, out of a thousand instances, there would be nine hundred and ninety-nine of abuse, in opposition to one fair and *bonâ fide* execution of such an intention as is here alleged, it is reasonable to conclude, that such a practice would not be permitted. If this could be admitted, what has any British merchant to do, but to put articles of any sort on board

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(1) 4 Rob. Rep. 96.

under such pretences? and how is it possible to prevent them from going without molestation into the hands of the enemy?"

Another material circumstance in all licences is the *limitation of time* in which they are to be carried into effect; for as it is within the view of government, in granting these licences, to combine all commercial and political considerations, a communication with the enemy might be very proper at one time, and at another very unfit and highly mischievous; it might be highly proper in 1799, and highly inexpedient in 1801. Time therefore appears to be a very important ingredient; if the party takes upon himself to extend the term of the licence, in this repects it would be a licence not reasonably assumed (1). Two circumstances are required to give due effect to a licence: first, that the intention of the grantor shall be pursued; and secondly, that there shall be an entire *bona fides* on the part of the user (2); but where a licence was limited to be in force until the 29th of Sept., and the ship did not sail from the foreign port till the 4th of Oct., it appearing that the goods were loaded on board by the 12th of Sept., and the adventure was then *boná fide* prosecuting under the licence, this was held legal. (3)

But these are not all the particulars in which a licence is construed strictly by the courts: the *port of shipment* also appears to be of moment. In the case of the Twee Gebroeders (4), it appeared that the vessel had obtained a licence for the purpose of bringing away a cargo from Bourdeaux to any port of this kingdom. The parties interested, however, thought proper, without any communication with government to change this licence, so as to accommodate it to a voyage from the port of St. Martin's: Sir William Scott condemned the ship and cargo. "It has been said," observed he, in giving judgment, "that specific licences were at the time obtained for the purpose of carrying on this trade from St. Martin's, and that the deviation cannot therefore be considered as contrary to the policy of government; but I cannot consider that as a sufficient excuse: such an alteration can only be made upon a particular representation, leaving government to judge of

(1) Cosmopolite, 4 Rob. Rep. 12, 13. Vandyck v. Whitmore, 1 East, 475. 4 Rob. 13.

(2) Per Sir Wm. Scott, Cosmopolite, 4 Rob. Rep. 12, 13.

(3) Schrooder v Vaux, 15 East, 52, 3. Groning v Crockett, 3 Campb. 83. S. P.

(4) 1 Edwards, 95.

the terms on which it may be proper to comply with the request. What is the ground of the policy of granting licences at all, but that government may see what communication is going on with the enemy: and therefore I do not think that a case, in which the real port is not disclosed, does come within that latitude of interpretation which the necessities of commerce might tolerate. Parties cannot be permitted to take licences for one purpose and apply them to another; in such a case it would be going beyond the powers of this court to extend its protection."

With respect to the limitation of the use of the licence *to the precise persons* for whose advantage it has been obtained, some difference of opinion appears to have prevailed. In the case of Defflis v. Parry (1), the following facts were proved:—A licence had been granted to Messrs. Bridge and Smith, enabling themselves, or their agents, or the bearers of their bills of lading on board six ships, to import certain goods. Other persons, by the permission of Messrs. Bridge and Smith, had imported goods in one of these ships, and bills of lading had been made out, by which the captain undertook to deliver the cargo, not to Messrs. Bridge and Smith, but to the shippers or their order: the shippers accordingly wrote to the merchants in London, by whom they were employed, enclosing one of the bills of lading indorsed in blank. But the same shippers also indorsed one general bill of lading for the whole cargo to Messrs. Bridge and Smith. The question was, whether this bill of lading, indorsed to Messrs. Bridge and Smith, who evidently had not the property of the goods, should be considered as the true bill of lading, or only as a fraudulent paper for the purpose of protecting the property of those who were not within the terms of the licence? Lord Alvanley thought the general bill of lading, indorsed to Messrs. Bridge and Smith, sufficient to protect the whole transaction. "I have no difficulty," concluded his Lordship, "in saying, that it was the intention of government, that any goods which should come to this country under their bill of lading, and with their permission, should be protected by the licence. I believe it to be within the knowledge of government, that this sort of use is made of the licences granted to individuals. We are not to construe the acts of government strictly against the merchants: if it had been in-

(1) 3 Bos. and Pul. 3.; and Hagedom v. Reid, 1 M. & S. see Feise v. Bell, 4 Taunt. 4. 567.

tended that the licence should have been more confined, I think it would have been so expressed. It appears to me, that a fair use has, in this instance, been made of the licence, the terms of which fully warranted the transaction." Shortly after this decision, a case, precisely similar, came on in the Admiralty Court before Sir William Scott, who decided contrary to this judgment of the Common Pleas. This was the case of the Jonge Johannes (1). Messrs. Bridge and Smith were the ostensible owners in this case also. This licence, as in the last case, extended not only to themselves, but to their agents and to the bearer of their bills of lading; and, as before, a general bill of lading had been made out to them, while there were other bills of lading, by which the master was bound to deliver the several parcels to the order of the Dutch shippers. Sir William Scott thus expressed himself upon the facts of this case: "Is it possible to say that these parties come under either of the descriptions of persons mentioned in the licence? Bridge and Smith are certainly not the importers, because the real and effective bills of lading consign the goods to other persons; they cannot claim any interest before the court. Are the claimants the agents of Bridge and Smith? Certainly not: that house appears rather to act as the agents of these persons, and to have no original interest in the shipment. Then the only possible character in which the claimants can stand before the court, is that of bearers of their bills of lading, as deriving a title from bills of lading transferred from Bridge and Smith. There was a general bill of lading on board, consigning the property to Bridge and Smith; but it appears clearly that this was meant to operate only as a formal paper, by which no right whatever was to be conveyed; there being other bills of lading on board, by which the master was bound to deliver the several parcels to the order of the Dutch shippers. Then how can I restore these goods under either of these titles? The only persons to whom I am authorised to restore, are Bridge and Smith as importers, or their agents, or persons holding their bills of lading, and claiming under bills of lading which Bridge and Smith, after having conducted the importation from the enemy on their own account, had transferred to them. Seeing that there is no apparent violation of good faith towards the public in the parties interested in this claim, I am sorry to be obliged to pronounce that there is no character in which they can receive

(1) 1 Rob. Rep. 263; and see Mennett v. Bonham, 15 East, 477.

restitution. The great principle in these cases is, that subjects are not to trade with the enemy, without the special permission of the government; and a material object of the controul which government exercises over such a trade is, that it may judge of the particular persons who are fit to be entrusted with an exemption from the ordinary restrictions of a state of war (1). I hardly conceive I am, upon any principle, warranted to declare, that when a licence is granted to one person, it may be extended to the protection of all other persons who may be permitted by that person to take advantage of it." The case of the Aurora (2) establishes the same general doctine as to the employment of the licence by the party to whose use it was granted, or by some person legally connected with him, for the purpose of that particular transaction.

The licence which came into question in the case of Timson and Merac (3) was very liberally construed by the court of King's Bench. This licence was proved to have been obtained for Merac and Co. and other British merchants, to authorise an importation of brandy, being according to the words of the instrument, the property of the said persons, or some of them, as might be specified in their bills of lading. Under this licence brandy was imported, of which Merac and Co. were the guarantees, but in which they had no absolute property of their own. "If," said Lord Ellenborough, "the licence had only extended to cover the property of Merac and Co. and they had no other interest in the goods than appears upon the statement of this case, it might have been contended not to be sufficient to cover this adventure; but it includes other British merchants; and it afterwards says, being the property of the said persons or some of them. It might, indeed, have been a more certain means of avoiding fraud, if the names of the persons really interested were specified in the licence; but the act of parliament does not require this, and it appeared at the trial that the licence in question was in the common form. The articles, however, licensed to be imported are specified, together with the ship and the time; and there could be no more than that ship could contain in one cargo; and these checks seem to have been thought sufficient for the purpose in view, without greater particularity."

(1) See Argument in the Hendrick. 1 Acton's Rep. 326.
(2) 4 Rob. Rep. 218.
(3) 9 East, 35.; and see Haydon v. Reid, 1 M. & S. 567. 3 Campb. 377. S. C.

The same liberality of construction appears also in the case of Rawlinson against Janson (1). A licence had been granted, extending protection to the cargo in question, upon satisfactory proof been made, that such cargo was really shipped by or under the directions of Henry Noden or his agents, for the purpose of being exported to some port on the river Elbe, Weser, or Jalide. It appeared that Henry Noden, on whose application this licence was obtained, after the goods were shipped, was only an agent for the persons really interested in the cargo, who were British merchants at Liverpool. Lord Ellenborough held that this was sufficient to protect the adventure under the licence, and the plaintiffs recovered. Upon a motion for a new trial, the Attorney General took the opinion of court, whether this were a sufficient compliance with the terms of the licence? But all the court were satisfied that it was sufficient; and Lord Ellenborough said, "that the object of inserting the name of a particular person in these licences, was to prevent their being obtained and handed about at large, by which means they might have been made an improper use of. But he had no doubt that Henry Noden, the person named, being proved to be the agent of the British merchants really interested in the adventure, sufficiently identified the licence with it." However, the case of Barlow and M'Intosh (2) throws much light on the two preceding decisions, and shews that they are not to be construed in quite so favourable manner as the terms of them might induce a hasty observer to conclude. A licence had been granted enabling Richard Smith and other merchants to import and export certain articles. The captain of the ship produced at the trial this licence, which he had received, previously to the voyage, from Mr. Schmaling, a merchant in London, the shipper of the goods in question, and which licence was on board during the whole voyage. The counsel, in support of the licence, referred to the before-mentioned cases of Defflis and Parry, and Timson and Merac, as cases turning on the generality of these trading licences, which had received a liberal construction, in furtherance of the trading interests of the country, meant to be facilitated by them. But the court observed, that in the latter of these cases, the licence was granted in the name of Merac and Co. who were sued upon their guarantee of the contract for the importation of the goods under the licence; and in the other case the importers of the goods under the licence were proved to have acted in con-

(1) 12 East, 223. (2) 12 East, 311.

nection with the persons to whom the licence was granted; and therefore those transactions were quite in the regular course. Le Blanc, J. further observed, that the licence, in this case, did not appear, by any evidence, to have been in the shipper's hands till above three months after the date of it, when it was given by him to the captain. And Lord Ellenborough, Ch. J. said, "that, previous to the time when the licence was proved to have been in the possession of Schmaling, and to have been by him delivered to the captain, it might have served for three voyages to Holland. It might have dropped out of the pocket of the person entitled to it, and been found by the present possessor of it. The possibility of such facts existing, consistently with the evidence given at the trial, called upon the shipper of the goods, who endeavours to avail himself of it, to connect himself by other evidence than the mere possession of the particular licence; otherwise, in the absence of all proof of such connection, there was a natural suspicion, a preponderance of probability, that the licence had been used before to cover an antecedent voyage, and against the lawful use of it upon the voyage in question. The state of the commercial world may make it expedient to grant licences in this very general form; but this generality subjects the practice to abuse. If the party who produces and seeks to avail himself of it, be required to shew when and how he obtained the possession of it, that will be a salutary check upon the abuse of it. I did not require the assured, at the trial, to shew that he was the person who obtained the licence from the Privy Council office. I am aware of the difficulties which may exist in disclosing the names of the real parties to the adventure, and the adventure itself; but he might have shewn that he obtained possession of it lawfully from the person by whom it was taken out. But if it be sufficient for a party, at any time, to stand upon his mere possession of such a general licence, there can be no check whatever upon any indefinite abuse of them."

There is another case (1) respecting the persons by whom the licence may be employed, which relates not, like the preceding cases, to the question, whether the party employing the licence be in reality the party for whose benefit government intended it should operate, but to the question of national character. The point in dispute was, whether a licence granted to Mr. Ravie of Birmingham, for the importation of certain goods from Holland

(1) Jonge Kassina, 5 Rob. Rep. 297.

into this country, would operate to protect a shipment made by him in person in Holland, and under papers describing the firm of his house as Ravie and Co. of Amsterdam? Sir William Scott decided that it would not, and condemned the property. It has recently been decided that a general licence is to be construed strictly, and not to extend to protection of enemy's property (1); but a licence particularly specifying any flag, protects even enemy's property. (2)

Sometimes a licence is granted upon an express condition; and then it is, of course, required that the condition be truly and fairly performed. This was decided in the case of Vandyck and Whitmore (3), where Lord Kenyon said, "Though the king may, at common law, licence a trading with the enemy generally, yet he may also qualify his licence; in which case the party seeking to protect himself under such licence must conform to the requisitions of it." The same point will also be found in a note of the case of Gordon and Vaughan, annexed to the case of Shiffner and Gordon. (4)

A licence, by its very nature, is calculated to subsist only during the continuance of the war in which it was granted. "Peace having been concluded," says Sir William Scott, in the case of the Planters Winsch (5), "a licence is necessarily done away and destroyed, having no subject matter to act upon."

We will now inquire, how far a licence granted by an ally in the war, is legally capable of protecting the property which it is designed to cover? In all innocent articles of commerce, it appears that a state is, of course, at liberty to authorize the dealings of her subjects with the enemy, without any express permission from any of her allies; but in articles that are contraband of war, the rule is otherwise, because the common cause may be directly and materially injured by such traffic. Sir William Scott, in the case of the Neptunus (6), said, "A practice has crept in, of admitting particular relaxations; and if one state only is at war, no injury is committed to any other state. It is of no importance to other nations, how much a single belligerent chooses to weaken and dilute his own rights, but it is otherwise

(1) The Josephine, 1 Acton, 313.
(2) The Hendrick, 1 Acton, 322. 2 Rob. 162.
(3) 1 East, 486.
(4) 12 East, 302.
(5) 5 Rob. Rep. 22.
(6) 6 Rob. Rep. 403.

when allied nations are pursuing a common cause against a common enemy. Between them it must be taken as an implied, if not an express contract, that one state shall not do any thing to defeat the general object. If one state admits its subjects to carry on an uninterrupted trade with the enemy, the consequence may be, that it will supply that aid and comfort to the enemy, especially if it is an enemy depending, like Holland, very materially on the resources of foreign commerce, which may be very injurious to the prosecution of the common cause and the interests of its ally. It should seem that it is not enough, therefore, to say that the one state has allowed this practice to its own subjects; it should appear to be, at least, desirable that it could be shewn, that either the practice is of such a nature as can in no manner interfere with the common operations, or that it has the allowance of the confederate state."

A licence duly granted by the King by virtue of his prerogative, or in pursuance of an act of parliament, legalizes a trade with the enemy in every respect. It was therefore held, in the case of Kensington v. Inglis (1), that where a certain trading with an alien enemy, for specie and goods to be brought from the enemy's country in his ships into our colonial ports, was licensed by the king's authority, that an insurance on the enemy's ship, as well as on the goods and specie put on board, for the benefit of the British subjects, was incidentally legalized; and that it was competent for the British agent of both parties, in whose name the insurance was effected, to sue upon the policy in time of war; the trust not contravening any rule of law or of public policy, and there being no personal disability in the plaintiff on the record to sue. But it was observed by Lord Ellenborough in that case, that the king's licence cannot have the effect of removing the personal disability of an alien enemy, so as to enable him to sue in his own name. If, however, the alien reside in this country with the king's permission, he might, in such case, sue in his own name. It was therefore held, in the case of Usparicha v. Noble (2), that a native Spaniard, domiciled here in time of war between this country and Spain, having been licensed in general terms by the king to ship goods in a neutral vessel from hence to certain ports in Spain, such commerce was legalized for all purposes of its due and effectual prosecution, either for the benefit of the party himself or of his

(1) 8 East, 273. (2) 3 East, 332.

correspondents, though residing in the enemy's country; and that such goods may therefore be insured by him, either on his own account or as agent for them, and that he might sue and recover upon the policy in his own name in case of a loss.

Orders in Council.

With respect to the issuing of orders in council by virtue of the King's prerogative, and independently of any act of parliament, there is little to be said which has not been anticipated in our general remarks on the power of the King as arbiter of commerce. Many of the rights which he possesses in that capacity are exercised through the medium of orders in council. It is usual, when a permission is to be given to a particular individual, to grant it by licence; but orders of council are of a more general nature, and contain dispensations or prohibitions extending to a whole branch of commerce.

It is scarcely necessary to add, that any thing which the statute law or the common law has ordained, cannot be contravened by an order in council, except in those cases where an act of parliament comprehends, amongst its own clauses, a power to the king of dispensing with its enactments. (1)

Of Dispensations founded on particular Acts of Parliament by Orders in Council.

Though we have seen that the king has not, by virtue of his prerogative, a power to dispense with the common law or any legislative provision, yet it has been usual, particularly during war, to give to the king in council a power of modifying or dispensing with such provisions as it may be found expedient, in particular conjunctures, to alter or suspend; for the interests of commerce being of so variable a nature, and depending so much on circumstances suddenly arising, it would be very difficult, not to say impossible, during war, to make them generally subject to any permanent legislative provision.

Thus the 43 Geo. 3. c. 153. s. 15 and 16. after reciting that it is expedient that his Majesty, by order in council, &c. should be authorized to permit, during the continuance of hostilities, and until six months after the ratification of a definitive treaty of peace, the importation, in any neutral ships whatever, of any goods from any port belonging to a state not in amity with his Majesty, enacts, "that it shall and may be lawful for his Majesty, by order in council, and, in Ireland, for the Lord Lieu-

(1) 1 Taunt. 227. 12 East, 296. Com. Dig. Prerogative.

tenant, or other chief governor or governors, and the privy council of Ireland, by order in council, from time to time, when and as often as the same shall be judged expedient, to permit, during the continuance of hostilities, and until six months after the ratification of a definitive treaty of peace, any such goods, wares, or merchandize, as shall be specified in any such order in council, to be imported from any port or place belonging to any kingdom or state not in amity with his Majesty, in ships belonging to the subjects of any kingdom or state in amity with his Majesty; any law then in force in the united kingdom, or in Great Britain or Ireland respectively, to the contrary thereof notwithstanding." By the 45 Geo. 3. c. 34. after reciting that it was expedient, under the then circumstances, to permit certain goods to be imported, under certain restrictions, in foreign ships belonging to subjects of states in amity with his Majesty, it was enacted, " that it shall be lawful for his Majesty, by and with the advice of his privy council, to grant a licence to any British subject to import into this kingdom, for his own account, or for account of a subject of any state in amity with his Majesty, from any country in America belonging to any foreign European sovereign or state, any goods of the growth or produce, whether manufactured or otherwise, of any such country, not prohibited to be used or consumed in this kingdom, in any ship belonging to any state in amity with his Majesty, and under such rules, regulations, restrictions, and securities, as his Majesty, with the advice of his privy council, shall approve; subject to the same duties as if imported in a British-built ship, and to the same rules respecting the payment thereof; with a proviso that all sugar and coffee imported in pursuance of the act shall be warehoused immediately on importation, and shall not be taken out of warehouse to be used or consumed in this kingdom, but only for exportation to foreign ports; provided always, that no such licence shall be granted to any person who shall not have exported, or given such security as shall be required for exporting, from this kingdom, according to law, to the possessions in America belonging to the same European sovereign or state, any goods or commodities bearing such proportion in value to the goods so to be imported as his Majesty, by and with the advice aforesaid, shall think reasonable, and direct." The statute then provided, that if any question should arise in any case, whether any thing which shall be done was authorized to be done by virtue of any such licence, the proof that such thing was done under the circum-

stances, and according to the terms and conditions in such licence to be expressed, should be on the person or persons respectively claiming the benefit of such licence.

By the 46 Geo. 3. c. 111. after reciting that, during the late and the present war, emergencies had arisen, and licences been granted contrary to law, but justifiable by the necessity of the case, with a view to the necessary supply of the British West India islands, and of lands and territories belonging to his Majesty on the continent of South America; and that it was proper that provision should be made for meeting such emergencies in future, without the necessity of frequent violation of the law by his Majesty's officers: it was enacted, "that it shall be lawful for his Majesty, by and with the advice of his privy council, to permit or authorize the governors or governor of the said islands and territories, in such manner, and under such restrictions, as to his majesty, by and with the advice of his privy council, shall seem fit to permit, when the necessity of the case shall appear to his Majesty, with the advice of his privy council, to require it, during the present war, the importation into, and the exportation from, any island in the West Indies, in which description the Bahama islands and the Bermuda or Summer islands are included, or any lands or territories on the continent of South America belonging to his Majesty, of any such goods as shall be mentioned in such order of his Majesty in council, in any ships or vessels belonging to the subjects of any state in amity with his Majesty, in such manner as his Majesty, by and with the advice aforesaid, shall direct, subject to certain modifications mentioned in the act." The 47 Geo. 3. sess. 2. c. 27. empowered his Majesty, by order in council, to grant licences for permitting naval stores to be imported from any place in amity with him, in any ship belonging to any state in amity, and navigated in any manner. The 48 G. 3. c. 37. (1) reciting that neutral ships, bound to ports on the continent of Europe from which the British flag had been excluded, had arrived in the ports of the United Kingdom, having been warned or brought into such ports in consequence of his Majesty's orders in council for that purpose, and parts of the cargoes of such vessels had been admitted to entry for home consumption, or warehoused for exportation, and other parts of such cargoes,

(1) See 15 East, 52.

consisting of goods the growth, produce, or manufacture of countries within the limits of the charter granted to the East India company, and not imported by the said East India company, and warehoused for exportation only; and in consequence of the late events in Portugal, wine and other commodities had been brought from the dominions of the crown of Portugal in vessels not owned and navigated according to law, all such importations, &c. are declared lawful, and the persons concerned are indemnified; and his Majesty, &c. was empowered, by order in council, during hostilities, to permit goods to be imported in any vessels from any ports from which the British flag is excluded. The 48 Geo. 3. c. 126. authorized goods secured in warehouses in the port of London to be removed under order in council to any other port in Great Britain for exportation in Europe. The second section enacts, that it shall be lawful for his Majesty, by order in council, or by his royal proclamation, to direct that all or any such licences as, by virtue of any act of parliament his majesty may lawfully grant under his sign manual, shall and may be granted by one of his Majesty's principal secretaries of state, in pursuance of an order of council specially authorizing the grant of such licence; a duplicate of which order shall, in all cases, be annexed to such licence. (1)

The third section authorized the exportation of goods, by order in council, in smaller ships than were otherwise allowed by law. The 49 Geo. 3. c. 25. permitted unmanufactured East Indian or South American tobacco to be imported by order in council. The 49 Geo. 3. c. 60. enacted, that, by order in council, during hostilities, goods, the produce of any country, may be imported into the United Kingdom from any port of Europe or Africa, in British or friendly ships, however navigated.

When orders in council are made in pursuance of these acts, the derivation of the power from the acts is frequently acknowledged in the recital at the beginning of the order, as in that of the 21st December 1808. "At the Court at the Queen's Palace, the 21st December 1808, present the King's most Excellent Majesty in Council: His Majesty, by virtue of the powers reserved to him by two certain acts passed in the 48th year of his reign, intituled, &c. is pleased to order, by and with the ad-

(1) See the form of such Order in Council and Licence in Dr. Phillimore on Licence Trade, Appendix, Nos. I. and II.

vice of his Privy Council, and it is hereby ordered, that until further order be made therein, the operation of the aforesaid acts be suspended, &c."

The power to make these orders of council, and to grant licences in pursuance of them, being derived from these acts of parliament, is of a limited nature, and cannot be extended further than the acts themselves permit. The construction of licences granted by virtue of the King's prerogative, already considered, will in general be applicable to licences founded on these statutes. (1)

(1) Per Ld. Ellenborough in Mennett v. Bonham, 15 East, 493.

CHAP. XI.

Of the Commercial Law of the United Kingdom in particular.—How publicly affected by Legislative Enactments. —The Restraints and Encouragements of Importations and Exportations, and of Bounties, Drawbacks, Bonding and Warehousing System, Docks, and Commercial Treaties.

HAVING in the preceding chapters examined the modes by which the commerce of a country may be affected by the acts of *foreign states*, whether in time of peace or war, we are now to enquire into the modes by which the commerce of the United Kingdom *in particular* is *publicly* affected by her own political regulations (1). This enquiry branches into two parts, respecting, *first*, the general and permanent system of commercial policy which Great Britain has been in the habit of pursuing, and *secondly*, those peculiar regulations which the king, by his prerogative, has the right of enforcing in commercial affairs.

I. Commerce of Great Britain in particular — How affected by Legislative Enactments.

The advancement of commerce appears to have been a favorite object of British legislators in very early periods of our history; even in the time of king Athelstan we find a very remarkable law, enacting that any merchant who has made three voyages upon his own account, beyond the British channel or narrow seas, shall be entitled to the privileges of a thane (2). But the zeal of those inexperienced legislators appears to have often exceeded their discretion; and even in times comparatively modern, the true interests of trade have been as much misconceived as in the turbulent reigns of John and Edward the Second. It was very long before the simple truth was comprehended, that the interests of trade do not usually require any legislative interference. They could not understand that statesmen in general best consult the interest of the merchant when they do not interfere, and when they leave him to act for himself (3). In the infancy of trade was invented, and reduced into practice, the theory of the commercial system,

(1) See division of the subject, ante 25.

(2) 11 Co. 87. Com. Dig. Trade, A 1. Bac. Ab. Merchant, in the introductory passage.

(3) Ante, 4—7.

with its complex apparatus of artificial regulations; by which the advocates of the system believed that they enlarged the whole amount of gold and silver which remained to a nation at the end of a given period after all her transactions of selling and buying. And it was thought that those nations only could be considered as prosperous who had a great balance of trade in their favour; that is, who *exported* more than they *imported*, and received the difference in silver and gold (1). But it is now universally acknowledged, that this balance of trade is a mere chimera, and that the annual produce of a country's land and labour, the only genuine sources of wealth, and the only genuine encouragements to population, cannot be materially increased or diminished, whether our exports be paid for in gold and silver or in any other commodity which may happen at the time to be most required. It will therefore be needless to pursue, in this place, those numerous arguments by which it might be proved that artificial regulations of trade have no tendency to produce this balance of gold and silver,—the balance itself being confessed to be immaterial; neither can it matter whether any particular regulations do or do not promote it; and therefore, in introducing any regulation respecting foreign commerce, it is neither necessary nor politic to provide for the acquisition of gold or silver, or a favourable balance of trade, as it is rather improperly termed, by prohibiting importation on the one hand, or, on the other hand, by encouraging exportation. The regulation should be founded on other principles.

The legislative interferences with foreign trade have been principally of two sorts: 1. Those which either restrain or encourage *importation* into Great Britain or her colonies; and 2. Those which either restrain or encourage *exportation*. The *restraints* upon *importation* were of two kinds: first, restraints upon the importation of such foreign goods for home consumption as could be produced at home, from whatever country they were supplied; secondly, restraints upon the importation of goods of almost all kinds from those particular countries with which the balance of trade was supposed to be disadvantageous. Those different restraints consisted sometimes in high duties and sometimes in absolute prohibitions (2). *Exportation* was *encouraged* sometimes by drawbacks, sometimes by bounties (3) or personal premiums

(1) Smith, W. of N. b. 2. c. 1, 2. 4. Tucker on Trade, Introd. 2. Ante, 156, 157.

(2) Tucker on Trade, 100—105.

(3) Id. ibid.

or prizes; sometimes by advantageous treaties of commerce with foreign states, and sometimes by the establishment of colonies in distant countries. *Drawbacks* were given upon *two* different occasions. When the home manufactures were subject to any duty or excise, either the whole or a part of it was frequently drawn back upon the exportation; and when foreign goods liable to a duty, were imported in order to be exported again, either the whole or a part of this duty was sometimes given back upon such exportation. *Bounties* were given for the encouragement either of some beginning manufactures, or of such sort of industry of other kinds as were supposed to deserve particular favour. By *advantageous treaties of commerce*, particular privileges were procured in some foreign state for the goods and merchants of this country, beyond what were granted to those of other countries. By the establishment of *colonies* in distant countries, not only particular privileges but a monopoly was frequently procured for the goods and merchants of the country which establishes them (1).

These four *encouragements* to exportation, together with the two before-mentioned *restraints* upon importation, were the principal means by which the advocates of what was called the mercantile system proposed to increase the wealth of Great Britain. The notion of an advantageous or disadvantageous balance of trade being set aside, as quite immaterial to the argument, it will easily be perceived that the country could not in general be benefited by the restraints upon importation, whether those restraints were general upon all commerce of import with such countries as were supposed to leave the balance against us, or whether those restraints were only directed against the importation of such foreign goods as could be produced at home. It will require little reasoning to establish that both these classes of restraints were impolitic; and that their impolicy was only increased when, instead of duties, the legislature imposed absolute prohibitions. It must always be the interest of every country to allow each individual to expend his money in whatever commodity, foreign or domestic, he may happen to want or prefer, since industry will always be the most encouraged when the motive to exertion is the strongest. That it must further be the interest of the country to take care, for the sake of encouraging industry still more, that the value of

(1) Smith, W. of N. b. 4. c. 1.

each man's labour shall be to him as great as possible; that is to say, that he shall be able to buy at the cheapest rate. Now he can buy at the cheapest rate only by throwing open the market to all sellers, which every restraint upon importation directly prevents. But then it is said foreigners would be able in many articles to undersell our own countrymen. If so, our own countrymen may be well convinced that it is not their interest to employ their industry upon any such article; that as it can be brought from abroad cheaper than it can be produced at home, they had better occupy themselves in some speculation where they have greater advantage. It will be observed, that as the competition is always supposed to be free among individual dealers of the same country, no individual derives any material gain from the restraints on importation. The profit of his trade, as of all others, can remain but at the ordinary level, when that level has once been settled by compepetition; and indeed the professed object of the restraints of importation is not to benefit the individual traders, but to give to the whole mass of the country a monopoly at home against all other nations. It is true that the capitals employed in any trade from which foreigners are excluded, must have flowed into other channels if the profits of that trade had been decreased, through a promiscuous admission of foreign as well as domestic dealers: and thus, by the effect of their competition would have lowered the profits of commerce in general; but the effect of a competition so small would have produced a decrease so insignificant, as to be scarcely worth any consideration in so general an estimate as the present. And it will be observed, that as all sellers are buyers too, their gain is not a clear gain even when it wears the most flattering aspect; for though they get a price for what they sell somewhat higher than they would have got if there had been more competition of capital against them in their own trades, yet for the very same reason they pay higher prices to all other tradesmen of whom they make their purchases in turn. If then the effect of a restraint upon importation is not to lower the general price, but rather, by excluding sellers who would furnish the goods more cheaply, to raise that price higher than it otherwise would be, thus to injure instead of benefiting the public at large and if at the same time, as I have endeavoured to shew, no considerable advantage accrues to the individual trader, it will be difficult to discover in what way the restraint can benefit the state. In short, the prohibition raises the

price of the thing sold almost without raising the profit of the seller, and by every such regulation we are endeavouring to check the wealth of our neighbours merely to establish a monopoly against ourselves. (1)

Restraints of Importation.

Having thus briefly considered the impolicy of the restraints upon importation, we shall now proceed to an examination of the law upon the subject, with the reasons on which the same is founded; and we will then proceed to examine the encouragements which have been provided for the importation of some articles of commerce.

General View of the Non-importation Laws.

The exclusion of foreign competition in the home market has been the principal object of those enactments, by which importation has been prohibited. The preambles of our statutes down to a very late period continually complain that the artificers of this country were greatly impoverished by the multitude of foreign wares, "fully wrought ready made for sale," which were brought from beyond the sea by merchant strangers and other persons, "by which occasion," says an old statute of Edw. 4. (2), "the said artificers cannot live by their mysteries and occupations as they have done in times past, but divers of them, as well householders as hirelings, and other servants and apprentices in great number are at this day unoccupied, and do hardly live in great misery, poverty, and need." (3) The earlier provisions, however, have been in some measure rescinded, as the progress of knowledge discovered their fallacy and the interests of commerce were thought to demand their repeal. A recent statute has been passed for the purpose of repealing two acts of parliament of a very early date, which prohibited the importation of wrought goods and certain other merchandize (4): the statute recites, that it appears no longer necessary or proper to continue the prohibition; and it seems to have been the policy of modern times rather to restrain importation by imposing duties, than to

(1) See further on this subject, Smith, W. of N. b. 4. c. 2. and Ricardo, Pol. Ec. 397, 8. Tucker on Naturalization Bill, 37. Ante, 137. Smith W. of N. ed. 1817. vol. 4. p. 165. Supplement to Encyclopedia Britannica, article Corn Laws and Trade.

(2) 4 Ed. 4. c. 4. and 1 Ric. 3. c. 12. repealed by 56 Geo. 3. c. 36. 39 Eliz. c. 4. 6 Geo. 3. c. 19., &c. &c. Observe the preamble of the unrepealed statute, 5 Eliz. c. 7. See Tucker on Naturalization Bill, 1, &c.

(3) See also the preamble to the statutes cited infra under this head.

(4) 56 Geo. 3. c. 36.

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prevent it altogether by prohibitory enactments (1). Many provisions, however, still continue in force, by which the importation of certain manufactures is absolutely prohibited. It is not often politic, it is indeed in general impossible, to abandon all at once a system that has been long and uniformly pursued. Dr. Smith seems to be of opinion (2), that it would be often improper to restore the free importation of foreign goods after it has been for some time interrupted, when particular manufactures, by means of high duties or prohibitions upon all foreign goods which can come into competition with them, have been so far extended as to employ a great multitude of hands. Humanity may in this case require that the freedom of trade should be restored only by slow gradations, and with a good deal of reserve and circumspection. Were those high duties and prohibitions taken away all at once, cheaper foreign goods of the same kind might be poured so fast upon the market, as to deprive all at once many thousands of our people of their ordinary employment and means of subsistence (3). The imposition of taxes upon domestic manufactures seems also to afford a just ground for laying a similar restraint on the introduction of the produce of foreign industry; in this case it seems reasonable that an equal rate of taxation should be adopted with regard to the productions of the foreign country (4): this, says Dr. Smith would not give the monopoly of the home market to domestic industry, nor turn towards a particular employment a greater share of the stock and labour of the country than would naturally go to it; it would only hinder any part of what would naturally go to it from being turned away by the tax into a less natural direction, and would leave the competition between foreign and domestic industry, after the tax, as nearly as possible upon the same footing as before it. In Great Britain, when any such tax is laid upon the produce of domestic industry, it is usual at the same time, in order to satisfy our merchants and manufacturers, to lay a much heavier duty upon the importation of all foreign goods of the same kind (5). Such is the general spirit in furtherance of which the laws that restrain and prohibit importation

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(1) The policy of discouraging the trade with France was first abandoned by Mr. Pitt, who by the commercial treaty which he concluded with that country reduced the duties on French wines, and on all other commodities, see 2 Smith, W. of N. 249. ed. 1817, and vol. 4. p. 161, &c.

(2) B. 4. c. 2. vol. 2. p. 220.

(3) 2 Smith, 220. b. 4. c. 2.

(4) Smith, W. of N. ed. 1817. vol. 4. p. 165.

(5) Smith, W. of N. b. 4. c. 2. vol. 2. p. 215. Id. ed. 1817. vol. 4. p. 165.

have been passed. The policy of the law will be more plainly perceived in taking a detailed view of these statutes against importation as they affect the particular trades and branches of commerce which they were designed to protect. Restraints of Importation.

The *woollen* manufactures of this country, on account of their extent and importance, were protected by very ancient statutes from the effects of foreign importation. By a statute passed in the reign of Edward III. (1), (a reign in which great attention was paid to the establishment of our domestic manufactures,) it was enacted, that no merchant should import *cloths* not made within the king's dominions, on pain of forfeiture of the clothes and further imprisonment at the king's pleasure. The statutes 3 Edward 4. c. 4. s. 1. and 4 Edward 4. c. 1. s. 7.(2). enumerate woollen cloths and woollen caps, among many other manufactured articles which are forbidden to be brought into the realm. The modern enactments, however, have only restrained the importation of woollen articles by the imposition of certain duties. Woollen cloths and woollen stuffs have distinct duties imposed upon them (3). The *tools and implements* used by the artificer have been guarded with the same jealousy as the manufacture itself. The 13 & 14 Car. 2. c. 19. provides that no foreign wool cards, or foreign card wire or iron wire for making woolcards, shall be imported into this kingdom (4). Woollen Manufactures.

(1) 11 Edw. 3. c. 3. 4 Bla. Com. 428. Pope, tit. 145. Painted cloths were prohibited by 1 Ric. 3. c. 12. now repealed by 56 Geo. 3. c. 36. See the former statute, Burn J. tit. Woollen Manufacture.

(2) Com. Dig. Trade, A. 4. The 3 Edw. 4. c. 4. is repealed by the stat. 56 Geo. 3. c. 36. In Pope, tit. 145. the 4 Edw. 4. c. 4. is cited by mistake in margin for the 4 Edw. 4. c. 1. s. 7.

(3) Woollen *yarn*, which has been rather considered as a *material* for the manufacture, is also rated with a duty. The duties will be found in 49 Geo. 3. c. 98. Schedule A. The temporary duty imposed by that act (being always one-third of the permanent duty) has been made permanent and therefore is now added to the permanent duty; and one-fourth of the original permanent duty is to be also added (56 Geo. 3. c. 29.) Pope, title 216.

(4) The 3 Edw. 4. c. 4. and 1 Rich. 3. c. 12., repealed by 56 Geo. 3. c. 36., prohibited cards for wool (except Roan cards) or those that came from Ireland. The 39 Eliz. c. 4. also prohibits them, and recites that many thousands of woollen card makers and iron wire drawers of London, Bristol, Gloucester, Norwich, and Coventry, had been used to live by card-making, &c. but that now, by reason of the common bringing in of foreign wool cards out of France and other parts, the card-makers had been so much impoverished, that scarce the twentieth part was maintained. Continued by 3 Car. 1. c. 4. and 16 Car. 1. c. 4. and enforced by 13 & 14 Car. 2. c. 19. as stated in the text. Smith, W. of N. b. 4. c. 8.

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It would of course materially interfere with the interests of our manufactures to allow the importation of such instruments.

Importation of *Silk* Goods, &c.

The *manufacture* of *silk*, a species of industry, which is altogether employed upon foreign *materials*, continues at the present day to be protected by various enactments which prohibit importation from abroad (1). Foreign wrought silks, as ribbonds and girdles, not manufactured in Great Britain, whether the same be wrought of silk alone, or wrought of silk mixed with any other materials, are forbidden to be imported under severe penalties (2). The 5 Geo. 3. c. 48., enacts that if any foreign manufactured silk stockings, silk mitts, or silk gloves shall be imported into any part of the British dominions, the same shall be forfeited, and shall be liable to be searched for and seized in like manner as other prohibited and uncustomed goods. The 50 Geo. 3. c. 55., which was passed to prohibit the importation of *Italian* silk crapes (3) and tiffanies, articles formerly allowed to be imported, (4) enacts, that *no foreign* silk crapes or tiffanies of any description whatever (except of China or the East Indies, imported for exportation), shall be imported into the kingdom of Great Britain, or the islands of Guernsey, Jersey, Alderney, Sark, or Man (5). The same act offers encouragement to the activity of the officers of the customs in seizing foreign wrought silks, velvets, crapes, and tiffanies, by providing that they shall receive two-thirds of the gross produce arising from the sale of the goods seized (6) The importation of

(1) Pope, tit. 98. 164. 177. Ante, 194, 5. Tucker on Trade, 104, 5.

(2) 3 Geo. 3. c. 21. and see as to wrought silk in general, 6 Geo. 3. c. 28. 8 Geo. 3. c. 25. s. 10. 19 Hen. 7. c. 21. 6 Ann. c. 19. s. 14. Pope, tit. 177. Silk lace may be imported on payment of a certain duty. 43 Geo. 3. c. 68. s. 32. Pope, tit. 164—246. 3 M'Pherson's An. Com. 119. Com. Dig. Trade, A. 4.

(3) There seems to be an error in the printed edition of the statutes, in putting a comma between the words silk and crapes See the latter part of the first section, and the two other sections, and 6 Geo. 3. c. 28. s.13. but see Pope, tit. 177.

(4) 6 Geo. 3. c. 28. s. 13.

(5) 50 Geo. 3. c. 55. s. 3.

(6) By 49 Geo. 3. c. 98. a duty was laid on wrought silk, viz. crapes or tiffanies of the manufacture of Italy. Pope, tit. 246. See also, as to silk, the statute 19 Hen. 7. c. 21. which prohibits silk wrought in ribands, &c. 13 & 14 Car. 2. c. 13. s. 2. 2 W. & M. sess. 1. c. 9. s. 2. As to thrown silk, 6 Ann. c. 19. & 14. as to secret and clandestine importing of wrought silks mixed with gold and silver, or any other materials, and 26 Geo. 2. c. 21. By letter from the board of treasury, dated 2d January 1817, it is stated, that their lordships are of opinion that silk stockings, silk handkerchiefs, shoes and gloves, when they ac-

wrought silks from Persia, China, or East Indies, otherwise than for exportation, was prohibited by the 11 & 12 W. 3. (1).; and the recent statute 59 Geo. 3. (2) prohibits the sale or vending in Great Britain of silk handkerchiefs of the produce of the East Indies.

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On the importation of wrought silks, bengals, and stuffs mixed with silk, or herba, of the manufacture of Persia, China, or the East Indies, and all calicoes printed, painted, or stained there, it is required by a statute of William, to prevent their being used in this kingdom, not with a view to enlarge the time for payment of the duty, that after they have been entered, they shall be forthwith carried and put into such warehouses as shall be approved by the commissioners of the customs, "so that none of them shall be taken or carried out thence upon any account *other than in order for exportation*," nor until sufficient security be given to his Majesty that they shall be exported, and not landed again in any part of England, Wales, or Berwick (3), those securities to be discharged by means of certificates obtained from the foreign country to which the goods have been exported (3); and that all such of the aforesaid goods, whether the same shall be mixed, sewed, or made up together for sale with any other goods or materials or otherwise, which shall be found in any house or other place (except in such warehouses as have been approved of by the commissioners), shall be forfeited and liable to be seized (4). It has been contended, that although the goods were meant to be relanded they could not be seized,

company the proprietors arriving from abroad, and are evidently a part of their *baggage*, and have been worn and used, should not be seized by the officers of customs, provided such articles do not exceed what may be reasonably allowed according to the rank of the party in whose baggage the same may be found. Pope, tit. 138. Various duties are imposed on import of knubs or husks of silk, raw silk, thrown silk, dyed and not dyed, and waste silk, 49 Geo. 3. c. 98. Schedule A. Pope, tit. 246.

(1) c. 10. s. 1. Pope, tit. 98. & 104.

(2) c. 52. s. 17.

(3) 11 & 12 W. 3. c. 10. s. 1. Pope, tit. 98. Stat. 8 Ann. c. 13. s. 14. provides that (as the goods may be vended in some parts from which no certificate can be obtained) all prosecutions must be within three years after the date of the bond and judgment, within two years after prosecution, or the bond is void, and must be delivered up by the revenue officer, or an action may be brought for damages and treble costs. Certificate within 18 months on exportation to Africa or America, &c. 5 Geo. 3. c. 35. s. 3. Pope, tit. 98.

(4) 11 & 12 W. 3. c. 10. s. 2. See also 8 Ann. c. 13. s. 24. As to importation to Africa and America, 5 Geo. 3. c. 35. s. 3. 6 Geo. 3. c. 10. s. 6. Wilson v. Saunders, 1 Bos. & Pul. 269.

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nor would the exporter's security be forfeited, until some attempt had been actually made to accomplish that purpose. But it has been decided, that if it can be shewn that the person who took the goods out of the warehouses had no intention to export them, and that he meant to put them on board a vessel in order to be carried one, two, or three leagues only from the shore, proof of that intention would defeat the allegation that they were taken out of the warehouse for the purpose of exportation. The circumstance of actual relanding need not be shewn, for the case would be vitiated by the intention with which the goods were taken out of the warehouse. If the circumstances of the case afford a presumption of illegality, they ought to be submitted to a jury; if, on the other hand, reasons of necessity existed to justify the exporter in acting in a manner apparently suspicious, he has an opportunity of explaining his conduct. As, when an action of trespass was brought against a custom-house officer for seizing goods, it appeared that the plaintiff, who had purchased at the India sale a quantity of Bandana handkerchiefs, sent them down with the usual forms in the care of a custom-house officer to the custom-house at Aldborough, where they were put on board the Experiment cutter by the custom-house officers, the plaintiff having entered them for Hamburgh, and the vessel having cleared out for that port, though in fact she was only a cutter licensed to fish between Flamborough head and the Isle of Wight. The plaintiff had given the usual security that the goods should be exported and not relanded; and the defendant, who was captain of the Argus revenue cutter, seized the vessel and goods after they had proceeded some way down the river, but while she was within the limits of the port of Aldborough, and a tidewaiter of that port was on board at the time (1). The court held that it ought to be left to the jury to determine whether the goods were put on board the cutter with the intention of being exported; that if they were not intended to be exported, they could not be said to

(1) It was objected that the goods were in custodiâ legis, and therefore could not be seized; but the court denied this, for they said, the owner, after giving security in London, according to the statute, was at liberty to export them as he thought fit; that the practice of sending down an officer with the goods was not required by the 11 & 12 W. 3. but adopted from 6 Geo. 3. c. 40. s. 6. which relates to the exportation of East India goods to Africa, and that the officer on board at the time was placed for the general protection of the revenue, and not to watch these goods. 1 Bos. & Pul. 269.

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be in a course of exportation, and that the goods had been properly seized, and the defendant was entitled to a verdict (1). The statute 11 & 12 W. 3. c. 10. enacts, that the exportation bond required by that act (2), shall be discharged without fee or reward, upon certificate returned under the common seal of the chief magistrate in any place beyond the seas, or under the hands and seals of two known English merchants upon the place, that such goods were there landed, or upon proof by credible persons that such goods were taken by enemies or perished in the seas; the examination and proof thereof being left to the judgment of the commissioners of the customs. A certificate obtained under such a provision by the exporter of goods under the hands and seals of two British merchants, is not evidence in a court of law, but only before the commissioners, to whom it seems to have been the intention of the act that it should be submitted; it is nothing more than a declaration of two individuals, not even given upon oath, and the commissioners may have opportunities of enquiring into its validity, which are not accessible in a court of justice. (3)

Linen Manufactures.

So great is the encouragement afforded to the woollen and silk manufactures, that it has been made unlawful to use or *wear* in Great Britain, in any garment or apparel, any printed, painted, stained, or dyed calico (4). It was also enacted by the statute 7 Geo. 1. st. 1. c. 7. that it shall be equally legal to wear or use in apparel, household-stuff, or furniture, any stuff made of cotton or mixed therewith, which should be printed or painted with any colour or colours; or any calico chequered or striped, or any calico stitched or flowered in foreign parts with colours or with coloured flowers made there, (muslins, neckcloths, and fustians excepted). Under this enactment it appears to have become a matter of doubt whether it was unlawful to wear printed stuffs made of *linen yarn* and cotton wool, which had been for many years manufactured in Great Britain, and were considered as forming a branch of the ancient fustian

(1) Wilson v. Saunders, 1 Bos. & Pul. 267.

(2) On the exportation of wrought silks, &c. of the East Indies, see 11 & 12 W. 3. c. 10. s. 2. and ante, 521. n. 3. 43 G. 3. c. 132. s. 13. which requires a similar certificate, though the provisions are somewhat differently worded.

(3) The King v. Vyse, Forrest's Rep. Exch. 35. held also, that though the certificate is required to be under the hands and seals of the merchants, proof of the signature is sufficient.

(4) 7 Geo. 1. stat. 1. c. 7. 3 Macpherson's An. Com. 118.

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manufacture of this kingdom (1). It was therefore provided, that the act should not extend to prohibit the wearing or using of any sort of stuff made of linen yarn and cotton wool manufactured and printed or painted with colours in Great Britain, provided that the warp thereof was entirely linen yarn (2). It has been also enacted, that any person may use or wear within Great Britain, any newly manufactured stuff, wholly made of cotton spun in Great Britain, when printed, stained, painted, or dyed with colours (3). Any person who should import into Great Britain any calicoes, muslins, or any other goods or stuffs made of linen yarn only, or of linen yarn and cotton wool mixed, or made wholly of cotton wool, wherein should be woven in the warp, in either or both selvages only, through the whole or any part of the length of each piece, one or more blue stripe or stripes of one or more thread or threads, was made liable by the 14 Geo. 3. to the punishment of forfeiture of the goods, besides a pecuniary penalty. (4)

Cambrick and French Lawns.

No *cambrick* or *French* lawns can be imported into Great Britain, except into the port of London, there to be warehoused for exportation (5). The duties imposed on these articles are higher than the duties on Silesia lawns. (6)

Leather Gloves, &c.

Foreign manufactured *leather gloves* or mitts cannot be lawfully imported into this kingdom or any part of the British dominions, and are liable to be searched for and seized in like manner as other prohibited and uncustomed goods, with a forfeiture of treble value and £200 penalty (7). The statute by which this prohibition is imposed, recites that "till of late years great quantities of foreign kid and lamb skins had been yearly imported into this kingdom in order to be manufactured into gloves and mitts, to the great benefit of trade, and employment of the poor in the manufacture thereof; but that it was become

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(1) 9 Geo. 2. c. 4.

(2) 9 Geo. 2. c. 4. Pope, tit. 165.

(3) 14 Geo. 3. c. 72. sec. 2. Pope, tit. 165.

(4) 14 Geo. 3. c. 72. The 49 Geo. 3. c. 98. enumerates in the list of articles on which duties are laid on importation, linen chequered or striped, or printed, painted, stained, or dyed after the manufacture, or in the thread or yarn before the manufacture, not being prohibited to be imported into or worn or used in Great Britain.

(5) 7 Geo. 3. c. 43. s. 1. & 4. Pope, tit. 165. 2 Smith W. of N. 255. b. 4. c. 3.

(6) 49 Geo. 3. c. 98. sched. A. Pope, tit. 246

(7) 6 Geo. 3. c. 19. The Attorney General v. Saggers, 1 Price, 182.

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necessary the legislature should interfere, in consequence of large quantities of foreign leather gloves having been clandestinely brought into this kingdom, whereby not only the revenue was defrauded, but many thousands of his majesty's subjects employed in the manufacture of leather gloves and mitts were deprived of the means of providing for themselves and their families; and that the preventing the importation of such foreign manufactured leather gloves and mitts would tend to the increase of the trade and manufacture of this kingdom, and would also encourage the importation of foreign kid and lamb skins." Another act of parliament, passed in the twenty-fifth year of George the third (1), enacts, that the provisions of the 6 Geo. 3. c. 19. shall be construed to extend to all *foreign leather cut into the form of* gloves or mitts, called shapes or tranks, or which shall be cut or prepared in any other manner or form, in order to be made into gloves or mitts, and which are not proper or fit to be used for any other purpose. An information was recently filed in the court of exchequer, founded on a statute 8 Ann. (2), against two defendants, for treble the value of 270 dozen pairs of foreign leather gloves, which having been imported and laid on land, had become forfeited, and being so, had afterwards come to the hands of the defendants, they well knowing that the importation was prohibited. Another count was framed on the statute 6 Geo. 3. c. 19. s. 1., for concealing 270 dozen pairs of foreign manufactured leather gloves, with intent to prevent the forfeiture or seizure of the same. The Lord Chief Baron, in delivering the judgment of the court, observed, that some ancient statutes (3) had been brought forward by the Solicitor General, wherein the importation of foreign gloves was prohibited; but they were repealed in effect, though not in terms, said his lordship, by subsequent statutes, and particularly by the 12 Car. 2. c. 4., by which the importation of foreign gloves was permitted, as appears at least by the imposition of certain duties on them, whereby the preceding acts, which prohibited them, were virtually repealed. It was not, however, said his lordship, admitted on the part of the crown, that the repeal of those statutes was a necessary consequence of the subsequent impost laid on the importation of previously prohibited goods; and the Solicitor General mentioned the case of an act of Car. 2. having pro-

(1) 25 Geo. 3. c. 55. s. 25.
(2) Ch. 7. s. 17.
(3) 3 Ed. 4. c. 4. 1 Rich. 3. c. 12. since repealed by 56 Geo. 3. c. 36.

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hibited the importation of hogs and bacon; and that though a subsequent act of Wm. 3. imposed a duty on bacon so imported, it was thought necessary that a third statute should, notwithstanding, be passed to declare that the act of Car. 2. should not be enforced (1); whereby it should seem, said his lordship, that statute laying duties on prohibited goods did not thereby repeal the original prohibition. But, he observed, that the Solicitor General did not insist on that point (2). Assuming, however, that the effect contended for in this case, is to be given to a statute by which a duty is imposed on the importation of an article which was before altogether prohibited, even if it be admitted that in such a case the duty would repeal the former prohibition, it should seem that this virtual repeal can only continue during the existence of the act of parliament in pursuance of which the impost is laid, and that when this act has expired, the prohibitory enactment will revive: now the statute 12 Car. 2. c. 4. which imposed a duty on foreign gloves, only professes to provide a subsidy during the life of the reigning monarch (3). The importation of gloves had been absolutely prohibited by *several* statutes, a practice not uncommon in the early ages, when laws, which had to contend with the turbulence of faction and the opposition of ignorance and interest striving together for mastery, were very apt to be overwhelmed or forgotten. The statutes 3 Edw. 4. c. 4. and 1 Rich. 3. c. 12. which enumerate gloves among other articles of prohibited importation, have been repealed by the statute 56 Geo. 3. c. 36. But another statute, the 5 Eliz. c. 7. (which has been continued by the 3 Car. 1. c. 4. and 16 Car. 1. c. 4.) seems to have escaped the attention of parliament when the 56 Geo. 3. was passed. Unless therefore the doctrine contended for in the case alluded to can be supported, and the legislature can be considered as having repealed their former prohibition when they enumerated gloves as one of the articles on the importation of which a particular duty was to be paid to his majesty, a doctrine which it seems is

(1) The 5 & 6 W. & M. c. 2. s. 4. recites that a duty of 4d. had been granted to the Crown by a former stat. of 4 & 5 W. 3. c. 5. for every pound of bacon imported within the time limited; but "which could not," says the act, "be answered to their majesties, because the importation of bacon is prohibited by 18 Car. 2. c. 2. and 20 Car. 2. c. 7." The 5 W. & M. c. 2. s. 4. then enacts, that the duty shall be paid non obstante the 18 & 20 Car. 2. or any other law.

(2) Attorney General v. Saggers, 1 Price 192.

(3) 12 Car. 2. c. 4. sec. 6. and rates of merchandize.

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not capable of being supported in law, the statute of Eliz. remains in force; by that statute it is enacted, that no person shall bring into this realm of England from parts beyond the seas, any gloves, being ready made or wrought in parts beyond the seas, to be sold, bartered, or exchanged within England or Wales, upon pain of forfeiting the wares imported, in what place soever they should be found, or the value thereof, one half to her majesty, and the other to any person who should seize the goods or recover the penalty. The provision of the statute 8 Ann. c. 17. s. 7. by which the offence of importing foreign prohibited goods, or having them in possession knowing that they were prohibited, is punished with the forfeiture of the goods themselves and treble the value, has been held to extend to the 6 Geo. 3. c. 19. which prohibits the importation of foreign leather gloves, for the statute of Anne is perspective in its operation, and extends to prohibitions that have been imposed at a time posterior to the act (1); and a charge of concealing foreign manufactured leather gloves is not inconsistent with a count on the 8 Ann. charging that the defendant had the goods in his possession, knowing them to have been illegally imported, although the same act might be sufficient to support both accusations. (2)

Oak Bark, when prohibited.

It is on account of its importance in the manufacture of leather, that many regulations have been made respecting the importation of *oak bark*. By the stat. 12 Geo. 3. c. 50. (3), the duty payable on the importation of this article was lowered, and a very small impost laid instead of that which formerly existed (4). The importation of this article therefore has been in general

(1) The Attorney General v. Saggers, 1 Price 182.

(2) Id. ibid.

(3) Made perpetual by 52 G. 3. c. 18. See Pope, title 139.

(4) By 49 G. 3. c. 98. sched. A. there shall be paid for oak bark the cwt. 4½d. Black oak or Quercitron, for the purpose of dying, imported from any country not in Europe, in casks containing not less than 150 lbs. net, the cwt. 6d.; otherwise imported, for every 100l. of the value, 20l. Red Mangrove, in casks not less than 150lbs. net, the cwt. 4½d; otherwise imported, for every 100l. of the value, 20l. Bark not otherwise mentioned, for every 100l. of the value, 37l. 10s. One third, and afterwards one-fourth of the duties of 49 Geo. 3. have been added by stat. 55 Geo. 3. c. 95. s. 1. The duties of customs payable upon the importation of any solid vegetable extract from oak bark, and other vegetable substances used in the tanning of leather, and for no other purpose whatever, are to cease; and in lieu of the duties thereby repealed there shall be paid for such solid vegetable extract from oak bark and other vegetable substances to be used for the purpose of tanning leather, and for no other purpose, 3s.

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encouraged, but on the other hand, it has been thought necessary to guard, by prohibitory enactments, the interests of those who produce it in this country. It is provided, that at all times when the price of oak bark shall be under £10 for the load of hatch bark containing 45 cwt. delivered at the buyer's warehouses in the city of London or within the weekly bills of mortality, or when the price of oak bark in the rinds shall be under £2 10s. for the load of rinds containing 30 yards, when the same are set three rinds thick with two shirts and a cover, delivered at the buyer's warehouses within the city of London, or weekly bills of mortality, then and in either of these cases, no oak bark whatsoever shall be allowed to be imported into Great Britain, under penalty of forfeiture of the bark, and £20 for every load thereof. (1)

Thread Lace, Silk Lace, Embroidery, and Gold and Silver Brocade.

The manufacture of *thread lace* has been thought worthy of particular protection and encouragement (2). It is now, however, lawful to import thread lace of foreign manufacture into Great Britain on payment of certain duties (3). If imported by way of merchandize to be sold, it can only be brought into the port of London (4). It is also lawful to import foreign silk lace on payment of certain duties and under certain regulations (5). But it is unlawful to import foreign embroidery, as well as gold and silver brocade. (6)

Gold or Silver Thread, Lace, &c.

It is also unlawful to import gold or silver thread lace, fringe, or any other work made thereof, or thread, lace, fringe, or other work made of copper, brass, or any other inferior metal or gold, or silver wire or plate (7). This law was principally made to counteract frauds that had been committed by a sort of tinsel copper or base metal being brought into the realm partly manufactured and wrought upon silk, in imitation of gold and silver lace, and so exactly counterfeited, that even persons of skill in the manufacture were daily liable to imposition.

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(1) 12 Geo. 3. c. 50. s. 2.

(2) 46 Geo. 3. c. 81.

(3) See the duties, Pope, tit. 216. 49 Geo. 3. c. 98. sched. A., adding one-fourth, and also one-fourth of the permanent duties imposed by that act.

(4) 46 Geo. 3. c. 81. s. 14. Pope, tit. 164.

(5) 43 Geo. 3. c. 68. s. 32. Pope, 164.

(6) Pope, tit. 164. Sail cloth restrained by high duties by 12 Ann. sess. 1. c. 16. and 19 Geo. 2. c. 27. Parker's Rep. 225.

(7) 15 Geo. 2. c. 20. s. 7. Pope, tit. 164. and see 10 Ann. c. 26. sec. 66.

The *button* manufacture has been protected by an absolute prohibition of the importation of all foreign buttons (1). It is also unlawful to import any *cut* whalebone, except in fins (2).

Restraints of Importation. Foreign Buttons, cut Whalebone, &c.

An old statute of Hen. 8. (3) enacts, that no person inhabiting within the realm shall buy, or otherwise take by exchange for other wares, any manner of (4) wares *made out of the realm* of tin, or mixed with tin, as platters, dishes, saucers, pots, basons, ewers, flaggons, goblets, salts, saltcellars, spoons, or any other thing made of *tin or pewter* as aforesaid, whatsoever, upon pain of forfeiture. The master and wardens of the craft of pewterers, as well in London as in every other city, were enabled to appoint expert persons to seize wares brought contrary to the act (5). Another statute enforces these provisions, by enacting that no person shall buy or take by exchange, or otherwise *take into* or within the realm, with intent to sell, any such wares as are above described, made out of the realm. (6)

Tin and Pewter Wares.

By an act passed in the 1st year of James the 2d., it is made unlawful for any person without the king's licence to import, by way of merchandize, any gunpowder, arms, ammunition, or utensils of war (7): and by a prior statute, the importation of rapiers, daggers, knives, hilts, pummels, lockets, chapes, dagger blades, handles, scabbards or sheaths for knives, is prohibited (8).

Gunpowder, Arms, &c.

The growers of corn, after the example of the manufacturers, have endeavoured to secure to themselves a monopoly in that article. It was probably, says Dr. Adam Smith, with a view to put themselves upon a level with those who they found were disposed to oppress them, that the country gentlemen and farmers of Great Britain so far forgot the generosity for which they

Corn Importation Laws.

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(1) 4 & 5 W. 3. c. 10, passed in consequence of former laws having been thought not to extend to *hair* buttons. 13 & 14 Car. 2. c. 13. 10 W. 3. c. 2. 8 Ann. c. 6. 4 Geo. 1. c. 7. 7 Geo. 1. c. 12. 10 Hen. 7. c. 21. Pope, title 177.

(2) 9 & 10 W. 3. c. 23. s. 12. 4 Ann. c. 12. s. 6. Pope, title 187.

(3) 25 Hen. 8. c. 19. Pope, 185

(4) The word "of" is omitted by mistake in the statute.

(5) 25 Hen. 8. c. 4. s. 2. Pope, title 185.

(6) 33 Hen. 8. c. 4. s. 6, 7.; see also 5 Eliz. c. 7. Com. Dig. Trade, A. 4.

(7) 1 Jac. 2. c. 8. s. 2. & 3. The act professes to be passed on account of prejudice of gunsmiths and other artificers, as well as disquiet of realm. Pope, title 182.

(8) 5 Eliz. c. 7. Com. Dig. Trade, A. 4.

Restraints of Importation.

are usually distinguished, as to demand the exclusive privilege of supplying their countrymen with corn and butcher's meat (1). The learned author then observes, that the agriculturists did not perhaps take time to consider how much less their interest could be affected by the freedom of trade than that of the people whose example they followed. Dr. Smith has enforced this opinion at more length in another part of his work, in treating of the bounties on the exportation of corn, under which division it will be necessary to resume the subject, and the general doctrine will be reviewed and the arguments considered. The most recent statute by which the importation of corn is regulated (2), provides, that all corn, meal or flour, the growth, produce, or manufacture of any *foreign* country which may now by law be *imported* into the United Kingdom, shall and may at all time be allowed to be brought to the said United Kingdom, and to be warehoused there under the regulations and provisions of the laws now in force relating to corn, without payment of any duty whatever: and that such corn, meal, and flour so warehoused may, at all times, be taken out of warehouse under the regulations and provisions now by law in force, and be *exported* according to such laws, without payment of any duty whatever. Such foreign corn, meal, or flour is, by the same act, allowed to be imported into the United Kingdom *for home consumption* under the provisions and regulations now in force, without the payment of any duty, whenever the average prices of the several sorts of British corn made up and published in the manner by law required, shall be at or above the following prices, that is to say, whenever wheat shall be at or above the price of 80*s*. per quarter; whenever rye, peas, or beans shall be at or above 53*s*.; whenever barley, beer, or bigg shall be at or above 40*s*.; and whenever oats shall be at or above 27*s*. per quarter. Whenever the average prices of British corn so made up and published, shall be respectively below these prices, no foreign corn, or meal or flour made from any of the respective sorts of foreign corn therein enumerated, shall be allowed to be imported into the United Kingdom for the purpose of home consumption, or taken out of warehouse for that purpose (3). The trade of the merchant importer of foreign corn

(1) Smith, b. 4. c. 2. p. 212. & 276, 7. Ricardo on Pol. Ec. 390. Pope, title 150. See the subject of importation of corn discussed in Sir H. Parnell's Speeches, Pamphleteer, 4 vol. 132. to 226. Rees' Cyclopœdia, tit. Bounty.

(2) 55 Geo. 3. c. 26. s. 3. & 4. see prior act, 31 Geo. 3. c. 30. s. 15.

(3) The 55 Geo. 3. c. 26. enu-

for *home consumption*, evidently contributes, says Dr. Smith, to the immediate supply of the home market, and must so far be immediately beneficial to the great body of the people. It tends indeed to lower, in some degree, the average money price of corn, but not to diminish its real value, or the quantity of labour which it is capable of maintaining. The trade of the merchant who imports foreign corn *in order to export it again*, also contributes to the plentiful supply of the home market. It it not indeed the direct purpose of his trade to sell his corn here; but he will generally be willing to do so, and even for a good deal less money than he might expect in a foreign market, because he saves in this manner the expence of loading and unloading, of freight and insurance. (1)

Restraints of Importation.

Great cattle, sheep and swine, beef and pork (2), except for the necessary provision of the respective vessels in which the same shall be brought, not exposing the same to sale, are not allowed to be imported from foreign countries, and are, with the ship conveying the same, subject to seizure by any person, and forfeited, half to the poor of the parish, the other half to the party seizing (3). An exception, however, is made

Cattle and Meat.

merates certain other prices which are to be a ground for allowing the importation of corn from the British colonies in North America, &c., and various other provisions, in other acts regulating the importation and exportation of corn, meal, or flour, are to continue in force, sect. 11. See also the statute 31 Geo. 3. c. 30. s. 15. Pope, tit. 150., which enacts that no corn ground, except wheat meal, wheat flour, and oatmeal, nor any malt, shall be imported into Great Britain from parts beyond the seas, under penalty of the forfeiture thereof, together with the ship or vessel in which the same shall be imported. Pope, tit. 150. reg. 1. See also 22 Car. 2. c. 13. which imposed high duties on the importation of wheat, rye, buck-wheat, oats, &c. when they did not exceed certain prices therein mentioned. See also 49 Geo. 3. c. 98. sched. A. tit. Corn. Buck-wheat may now be imported on payment of a certain duty every quarter of 8 bushels each. 57 Geo. 3. c. 27. exp. 25th March, 1821. Pope, tit. 246. title Corn.

(1) Smith's W. of N. b. 4. c. 5. 3 vol. small ed., 16—22. See observations, Ricardo's Pol. Ec. 375 to 403.

(2) Bacon or hams are now charged with a duty on importation, 49 Geo. 3. c. 98. sched. A. Pope, tit. 246.

(3) 18 Car. 2. c. 2. (made perpetual by 32 Car. 2. c. 2. s. 2.) is intituled an act against imports from *Ireland* and other countries. Smith's W. of N. b. 4. c. 2. vol. 2 209., recites in the preamble the decrease in the *rent and value of land*; is enforced by 20 Car. 2. c. 7. s. 2. Besides forfeiture, the 18 Car. 2. enacts that the importation shall be a public and common nuisance. Pope, tit. 144. Smith's W. of N. b. 4. c. 2. vol. 2 209. Observations on these laws in Anderson's His. Com. vol. 2 477. 487. and Sir W. Temple's Opinion there noticed.

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in favour of the importation of cattle from the Isle of Man, so as the number of the said cattle do not exceed 600 head yearly; and that they be not of any other breed than of the breed of the Isle of Man; and that they be landed at the port of Chester, or some of the members thereof, and not elsewhere (1). The importation of live cattle is necessarily very much restrained by the difficulty and expence with which the carriage of cattle by sea must be always attended.

Fish.

Similar provisions have been made for the advancement of the British fisheries. It is provided, that no herring, cod, pilchard, salmon or ling, fresh or salted, dried or bloated, nor any gril, mackrel whiting, haddock, sprats, coal fish, gull fish, congers, nor any sort of flat fish, nor any other sort of fresh fish, that is taken by or received from any foreigner or out of any stranger's bottom (except protestant strangers inhabiting in Great Britain), shall be imported into England (2). It is, however, lawful to import eels, stockfish, anchovies, sturgeon, botarge or cavear (3). At one time, the importation of lobsters and turbots was prohibited by statute, but this prohibition has been repealed, and they may now be imported in any vessel, whether they be of foreign or of British catching (4). Foreign caught oysters we have seen may be imported on payment of a duty of nine-pence per bushel (5).

Cocoa Nut Shells, &c.

It has been sometimes thought necessary to restrain importation, or prohibit it entirely for the preservation of the health of the king's subjects, or to protect the revenue from fraud. Cocoa nutshells and husks, without the nuts thereunto belonging, have been prohibited on account of a practice that had prevailed of importing the shells and afterwards working them up in imitation of coffee and chocolate, to the prejudice of health, as well as the diminution of the revenue (6). No chocolate ready made, nor any cocoa paste, is

Chocolate ready made.

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(1) 18 Car. 2. c. 2. s. 3. (perp. by 32 Car. 2. c. 2. s. 2.) and before that act 15 Car. 2. c. 7. s. 21. Pope, tit. 141. 2 Smith, 209. b. 4. c. 2.

(2) Ante, chapter on Fisheries. 1 Geo. 1. st. 2. c. 18. s. 1. further enforced by 9 Geo. 2. c. 33. & 26 G. 3. c. 87. s. 43. which recites that foreign fish continue to be imported, to the detriment of the fisheries, and of our naval interests. Neither 9 Geo. 2. nor 26 Geo. 3. refer to the statute 18 Car. 2. c. 2. s. 2. nor 10 & 11 W. 3. c. 24. s. 13. qu. vide. Pope, tit. 154. Fish, British caught and cured, are duty-free, 49 Geo. 3. c. 98. s. 13. And lobsters are free from duty, id. sched. A.

(3) 1 Geo. 1. st. 2. c. 18. s. 3.

(4) 1 Geo. 1. st. 2. c. 18. s. 10. Ante 370, 1.

(5) Ante, 371.

(6) 4 Geo. 2. c. 14. s. 12. Pope, tit. 147.

allowed to be imported (1). Every person is forbidden to bring into the realm from beyond the seas, *hops* deceitfully or corruptly unclean, corrupt, or mixed with any powder, dust, dross, sand or any other soil, under a penalty of forfeiting the goods so illegally imported (2). But in general foreign hops may be imported and entered for home consumption subject to the payment of duty and other regulations. (3)

Restraints of Importation.
Unclean and other Hops.

No *tobacco* can be imported into Great Britain from any place whatever, other than some place in his Majesty's plantations in America, or within the United States of America (4). No tobacco (except tobacco of the growth, production, or manufacture of the plantations of Spain or Portugal, and snuff,) can, in general, be imported into Great Britain from foreign parts, either wholly or in part *manufactured*, or in any state or degree of manufacture (5); and no tobacco stalks, whether manufactured or unmanufactured, or tobacco stalk, flour or snuff work, can in general be imported into Great Britain from foreign parts (6). And as a precaution against any opportunities that might be afforded to the landing and using of salt without payment of the duty, it is directed, that salt that has been used in packing and preserving provisions, hides, &c. imported, shall be thrown overboard on the landing of the goods (7). And no bast or straw, chip, cane, or horsehair hats or bonnets, nor any platting or other manufactures thereof to be used in or proper for making such hats or bonnets, can by law be imported into any part of Great Britain except *into the port of London*. (8)

Manufactured Tobacco.

Foul or loose Salt, &c.

Straw or Chip Hats.

Importation has been sometimes restrained, in furtherance of the interests of the British navigation system. It was a part of the policy of the celebrated navigation laws, to secure to this country the benefit of the *carrying* trade which was then principally engrossed by the Dutch. In order to effectuate this object, it has been provided, that articles of colonial production shall not be allowed to be imported into this country from any place

No Colonial Produce except from Place of Growth.

(1) 10 Geo. 1. c. 10. s. 2. Pope, tit. 147.

(2) 2 vulgo 1 Jac. 1. c. 18. s. 2. perpetual by 3 Car. 1. c. 4. and 16 Car. 1. c. 1. Pope, tit. 162.

(3) See several regulations, Pope, tit. 162.

(4) 29 Geo. 3. c. 68. s. 5. Pope, tit. 186.

(5) 30 Geo. 3. c. 40. s. 4. Pope, tit. 186.

(6) 29 Geo. 3. c. 68. s. 8. loose tobacco for crew excepted, s. 10. Pope, 186.

(7) 17 Geo. 3. sess. 2. c. 30. s. 3.

(8) 10 Geo. 3. c. 43. s. 6. Pope, tit. 142.

Restraints of Importation.

but that in which they were produced, and others are forbidden to be brought from the Netherlands or Germany. It is enacted by the stat. 12 Car. 2. c. 18. s. 4. that no goods or commodities of foreign growth, production, or manufacture (1) (which, it was provided, should be brought into England, Ireland, Wales, Guernsey and Jersey, or Berwick, in English-built shipping or other shipping belonging to some of the aforesaid places, and navigated by English mariners) shall be shipped or brought from any other places *but those of the growth*, production, or manufacture, or from those ports where the said goods and commodities can only be, or are, or usually have been first shipped for transportation, and from no other places. The stat. 19 Geo. 3. c. 48. was passed in consequence of doubts having arisen whether such goods as are included in this provision, if carried from the place of their production into any foreign parts of Europe and *manufactured there*, might not be imported into this kingdom, and the other dominions of his majesty mentioned in the stat. 12 Car. 2. from the European countries in which they had been manufactured; and after reciting that the importation of goods so manufactured would be prejudicial to the trade and navigation of Great Britain, as well as to the artificers employed in manufacturing, it proceeds to enact, that the statute 12 Car. shall not extend to allow any goods whatsoever of the production of Africa, Asia, or America, and although afterwards manufactured in foreign parts, to be imported into Great Britain, Ireland, or the islands of Guernsey, Jersey, or Man, unless they have been manufactured in the place in which they were grown and produced, or in which they were first shipped for transportation (2).

Spicery, &c. from Netherlands.

The 13 and 14 Car. 2. c. 11. s. 23. enacts that no sort of wines (other than Rhenish), no sort of spicery (3), grocery (4), tobacco, potashes (5), pitch (5), tar (5), salt (6), rosin (7), deal boards, fir-timber (7), or olive-oil (8), shall be imported into England from the Netherlands or Germany (9). This act has been

(1) i. e. goods *of Asia*, Africa, and America. 19 G. 3. c. 48. Reeves, 2d ed. 121. Pope, tit. 1.

(2) See Pope, tit. 1. and s. 2. of 19 Geo. 3. as to oil of cloves and some other articles; and see as to East India goods 12 Car. 2. c. 18. s. 13. 57 Geo. 3. c. 9. s. 1.

(3) See however the regulations of 3 and 4 Ann. c. 4. s. 6. 8 Ann. c. 7. s. 13. 6 Geo. 1. c. 21. s. 45. 8 Geo. 1. c. 18. s. 21. Pope, tit. 179.

(4) See however 56 Geo. 3. c. 37.

(5) Pope, tit. 182. 47 Geo. 3. sess. 2. c. 27.

(6) Pope, tit. 175. Foreign salt for curing fish; when free from duty. 38 Geo. 3. c. 89. s. 12.

(7) But see 6 Geo. 1. c. 15. s. 23. 46 Geo. 3 c. 117. s. 1. 51 Geo. 3. c. 43. s. 1. Pope, tit. 189.

(8) Pope, tit. 167.

(9) Pope, tit. 1.

repealed so far as it prohibits deal boards and fir timber from Germany (1), and so far as it relates to prunes the produce of that empire (2). It seems that the exception in favour of Rhenish wines extends to all wines of the growth of Germany or the emperor's dominions thereabouts,—that it is not to be confined to the strict literal sense of the words, namely, to such wines as grow on the borders of the Rhine, but must be taken according to the common acceptation by which all wines of the growth of Germany or the emperor's dominions are generally called Rhenish (3). It is also contrary to law to import *tea* into the kingdom from any place but that of its growth, although the same tea may have been formerly exported from this country (4). We have already fully considered the different provisions of the navigation laws, as it affects the importation of foreign goods to this country or its colonies. (5)

Restraints of Importation.

Tea only from Place of Growth.

The circulation of *counterfeit* or bad money, has been also guarded against by prohibiting it to be brought into the kingdom. Importing counterfeit money resembling the money of England, knowing it to be false, in order to utter it in this country, amounts to the crime of high treason (6). Importing counterfeit gold and silver coin made current within the realm by proclamation, &c., knowing it to be counterfeit, and with intent to utter it in this kingdom, is also high treason (7). Knowingly importing counterfeit bank tokens, with intent to utter them in this kingdom, has been made felony, punishable with seven years' transportation (8). The 14 Geo. 3. c. 42., which was passed in consequence of old silver coin, greatly below the standard of the mint in weight and fineness, having been imported into the kingdom, prohibited the importation of *light* silver coin purporting to be the coin *of the realm* from foreign countries (9). The statute 37 Geo. 3. c. 126. enacts, that if any person shall bring into the realm any

Counterfeit Money.

(1) 6 Geo. 1. c. 15. s. 1. Pope, tit. 1. reg. 21. Smith, W. of N. b. 4. c. 2.

(2) 56 Geo. 3. c. 37.

(3) Reeves, 2d ed. p. 166. Pope, tit. 1. rule 21. note b.

(4) 11 Geo. 1. c. 30. s. 8. Pope, tit. 184.

(5) Ante 169 to 264.

(6) 25 Edw. 3. st. 5. ch. 2.

(7) 1 & 2 P. & M. c. 11.

(8) 51 Geo. 3. c. 110. and see 41 G. 3. c. 71. s. 2. as to counterfeit dollars and tokens of England and Ireland; and 45 Geo. 3. c. 42. s. 1. 48 Geo. 3. c. 31. 53 Geo. 3. c. 106. s. 1. as to Irish tokens, and see the old stat. 9 Edw. 3. stat. 2. c. 2—9 & 10.

(9) Made perp. by 39 Geo. 3. c. 75.

Restraints of Importation.

counterfeit coin, not the proper coin of the realm, nor permitted to be current within the same, but made to resemble the coin of a *foreign* country, knowing it to be counterfeit, and with intent to utter it in this kingdom, he shall incur the guilt of felony, and be liable to transportation for seven years. It will be observed, that these enactments only extend to the importation of *counterfeit* money, and of *light* gold and silver coin. Bullion and *foreign coin* of gold or silver may be lawfully imported, and without payment of any duty (1). And an ancient statute provides, that all merchants, natives and strangers, may safely carry and bring within our said realm plate of silver and billets of gold, and all other manner of gold, and all money of gold and silver, to our bullion or to our exchanges which shall be ordained at the staples and elsewhere, taking there money of our coin of gold and silver according to the value. And if any will take *good money* of gold and silver of other coin than of ours in payment, he shall take the same without impeachment, so that none be thereunto compelled if he will not take it of his good will. Provided always, that no money have common course within our said realm and lands but the money of gold and silver of our coin. (2)

Popish Books, &c.

The importation of popish images and popish books has been prohibited, out of zeal for the interests of the established religion. To import from the see of Rome any agnus dei, crosses, beads, or other superstitious things pretended to be hallowed, is an offence that subjects the person guilty to the pains of a præmunire (3). Importing popish books subjects the offender to a pecuniary penalty of 40*s*., and the books imported are to be burned. (4)

Import from an Enemy's Country. (5)

It should also be mentioned as a branch of the law relating to the importation of merchandize, that no goods can be lawfully imported into this country from an enemy's dominions, without the licence of the crown (6). This proposition follows as a consequence of the legal doctrine which has been discussed in ano-

(1) 49 Geo. 3. c. 98. sched. A. tit. Bullion.

(2) 27 Edw. 3. st. 2. ch. 14. Pope, tit. 148.

(3) 13 Eliz. c. 2. s. 7. 4 Bla. Com. 115. 1 East. P. C. 26, 27. Pope, tit. 175.

(4) 3 Jac. 1. c. 5. s. 25. 1 East. P. C. 26. Pope, tit. 140.

(5) It should also be remembered that the East Indian trade, and consequently importation from thence, is regulated by several statutes. See post, next chapter.

(6) Potts v. Bell, 8 T. R. 548. reversing Bell v. Gibson, 1 Bos. & Pul. 345. Ante. 377. to 392.

Restraints on Importation.

ther place (1); according to which all commerce with an enemy, except with the permission of the crown, is illegal on the part of the British subjects. The reason of the law in this particular instance is plainly discernible, when we consider that if such an importation were to be allowed, export duties would in most instances be paid to the country from which the goods were brought, and by this means the " sinews of war" would be furnished to the hostile government. The legislature of this country has been in the habit of enforcing the same policy by acts of parliament usually passed on the commencement of hostilities. It seems indeed to have been formerly the practice only to *restrain* trading with the enemy by certain regulations; and in some instances, the import trade in particular has been prohibited. But it has been lately established, as above remarked, that all trading with an enemy is forbidden at common law, and it has been of late years universally prohibited by act of parliament, under severe penalties (2). Under the stat. 3 Ann. c. 13. which prohibited the importation of French goods during the existing war, under the penalty of a forfeiture of the goods and ship, one-half to her Majesty, and the other moiety to the informer, it was held by the court of exchequer, that French wine bought in Holland and imported into this country by the order of the Queen, with her money and for the necessary use of her family, was not forfeited (3). The title of the crown to a ship forfeited under this act also came in question in the court of Exchequer in a case, the circumstances of which were as follows: a ship with French goods came into the port of Penzance and was there seized by the admiral's officers as a perquisite of the admiralty. A custom-house officer afterwards seized the ship as forfeited on the French prohibition act; and having exhibited an information moved for a prohibition, which was granted on the ground " that the ship was forfeited by the act of parliament upon coming into port, and the seizure by the admiral did not prevent the forfeiture." And Lord Chief Baron Ward cited a case in the time of Lord Hale, where goods were put on board, on which the duty had not been paid, and carried to sea and became flotsam; and a suit was commenced in the admiralty, who have jurisdiction of flotsam; and upon an information in the exchequer for the forfeiture, on account of the goods

(1) Ante, 377, 8, &c.

(2) See the acts of parliament collected and commented upon in Bristow v. Towers, 6 T. R. 39 to 44, and subsequent acts.

(3) Bruse v. Harcourt, Parker's Rep. Exch. 274.

Restraints of Importation.

having been shipped before the duty was paid, a prohibition was granted; for the crown had a title, by the forfeiture, and the goods becoming flotsam afterwards, did not purge the forfeiture." (1)

Books and Prints, &c.

Lastly, the importation of books and certain other works of art, without the consent of the author or other person to whom the benefit of the production may have been secured, is illegal, during the term in which the sole property continues. By the copyright act (2) it is forbidden to import any books during the term of twenty-eight years, or any further time in which the exclusive property remains, without the consent of the proprietor first obtained in writing; and the importer is liable to an action on the case, at the suit of the author or other proprietor. Similar regulations have been made for the protection of pieces of sculpture (3), as well as of historical prints, or prints of any other description, engraved, etched, drawn, or designed in any part of Great Britain (4). These regulations are intended to secure to the author the benefit of his productions; the importation therefore of such inventions is considered as the infringement of a private right, and is punishable as such in an action at the suit of the proprietor.

Encouragements to Importation.

It will now be proper to take a view of those instances in which the importation of foreign merchandize has been deemed worthy of favour and *encouragement*. The general line of policy adopted by the legislature of this country, with regard to importation, has been already discussed at large (5). At the same time that it was deemed necessary to protect the manufacturing interest, either by an absolute prohibition of goods of foreign manufacture, or by exacting high duties on their importation, it was thought no less expedient to facilitate the introduction of *unwrought* materials, and to encourage the importation of those foreign productions in their rudest state, without which many of our own manufactures could not be carried on (6). The importation therefore of the *materials* of our manufactures has been sometimes encouraged by bounties, that is, by sums expressly

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(1) Score v. the Lord Admiral, Parker's Rep. 273.

(2) 54 Geo. 3. c. 156. s. 4. 8 Ann. c. 19.

(3) 54 Geo. 3. c. 56.

(4) 17 Geo. 3. c. 57. 7 Geo. 3. c. 38. 8 Geo. 2. c. 13. Pope, tit. 172.

(5) Ante, 514. 517, &c.

(6) Stephani. v Burrow, 2 Anst. 352. Smith W. of N. b. 4. c. 8. Tucker on Naturalization Bill, 2d part, p. 7, 8, 9.

paid as a reward for the importation; at other times, articles of this nature have been encouraged by an exemption from paying duties; and when duties have been imposed, unmanufactured articles have been in general admitted at a rate much inferior to that charged upon other merchandize of the same nature. As the exigencies of the state have increased, a small *duty* is now charged on most of those articles of foreign commerce, in respect of which, out of regard to the manufactures of this country, it was formerly the practice to exact no duty whatever. It is still however of importance to consider some of the provisions by which the importation of the materials of our manufactures is governed, under that branch of the subject which relates to the encouragements of importation, as it is in favour to the manufactures that these provisions have been made, and as such a division of the subject serves to illustrate the doctrine, in pursuance of which it has been seen that the importation of articles of foreign manufacture has been prohibited and restrained. Encouragements to Importation.

By the statute 6 Geo. 3. c. 52. s. 20. it was made lawful for any person to import into Great Britain, in British-built vessels, any sort of cotton wool from any place whatsoever, without paying any duty (1). A small duty, however, is now charged (2). A duty has been also imposed on all sheep's wool imported into this country (3), although it appears that it might have been formerly imported into Great Britain from several different countries without paying any duty (4). It has been held that the words "all sorts of wool," in the 43 Geo. 3. c. 153. s. 13., do not include cotton wool, but merely wool from the back of the sheep; and that therefore the importation of cotton wool from Amelia Island, in a Portuguese vessel, owned by a British subject, the captain and crew of which were Portuguese, was contrary to the navigation act (5). In the ninth year of Geo. 3. a law was made to encourage the importation of raw silk into this country from the plantations in America; at the time when this provision was made, the interest of the colonies was considered as identified with that of the mother country; a bounty was therefore granted by the 9 Geo. 3. c. 38. to encourage the growth and culture of raw silk in the American plantations, as Wool. Raw Silk.

(1) Pope, tit. 190. Smith, b. 4. c. 8. vol. 3. p. 147.

(2) 49 Geo. 3. c. 98. Pope, tit. 246. See Lord Sheffield's Reports on Wool Trade, Pamphleteer, 3 vol. 282. 4 vol. 88.

(3) Pope, tit. 246.

(4) 3 Smith, 146.

(5) Pearce *v.* Cowie, 1 Holt C. N. P. 69.

Encouragements to Importation.

well as with a view to furnish a certain supply of that article for the silk manufactures of Great Britain. It was granted for twenty-one years, from the 1st January 1770 to the 1st January 1791. For the first seven years it was to be at the rate of twenty-five pounds for every hundred pounds value; for the second, at twenty pounds; and for the third, at fifteen pounds. It has not however been considered expedient to continue this provision, and a duty is now laid on the importation of raw silk. (1)

Linen Yarn.

By the statute 29 G. 2. c. 15. s. 13. it was provided that no duty should be demanded upon any raw or brown linen yarns made of flax, and known by the names of Dutch yarn and French yarn, and of Spruce or Muscovia yarn, or any other foreign raw or brown linen yarns made of flax which shall be imported into this kingdom, but all such linen yarns may be imported duty-free (2). A small duty, however, has been since imposed. It was of course the interest of the linen manufacturers to obtain the linen yarn at as cheap a rate as possible. It is observable, however, that this enactment extends far beyond the *rude* materials of the work in favour of which it has been made, and aims at the advancement of the manufactory of linen at the expence of a large portion of subordinate industry. It is worthy of remark, that more than four-fifths of the whole quantity of labour necessary for the preparation of linen cloth is employed in preparing the linen yarn. (3)

Dying Drugs.

It was also provided by a statute of 8 Geo. 1. c. 15. s. 10., for the encouragement of the manufactures, that all sorts of *drugs* and other goods therein mentioned used in *dying* should be imported without paying any duty (4). It has however been since enacted, that some duties shall be paid on the importation of articles of this nature (5). A bounty was granted in the last reign on the importation of *indigo* from the British plantations in America, in order to encourage the growth of an article of so much utility in dying our manufactures, and to furnish this country with a cheap and certain supply. When the plantation indigo was worth only three-fourths of the price of the best

(1) Pope, tit. 246. Smith's W. of N. b. 4. c. 8. vol. 3. p. 150.

(2) Pope, tit. 192. By an error in the press, s. 3. is put for s. 13, term 15 years. Smith, vol. 3. 148. b. 4. c. 8. and see 24 Geo. 2. c. 46.

(3) Smith, W. of N. b. 4. c. 8. vol. 3. 148.

(4) 3 Macph. An. Com. 121, A. D. 1722.

(5) Pope, tit. 246.

French indigo, it was by this act entitled to a bounty of six-pence the pound. This bounty, which, like most others, was granted only for a limited time, was continued by several prolongations, but was reduced to four-pence the pound. It was allowed to expire with the end of the session of parliament which followed the 25th March 1781. (1)

Encouragements to Importation.

Foreign salt imported for the sole purpose of curing and preserving fish is regarded more favourably than salt imported for any other purpose (2). It is provided by a late act of parliament, that every bushel of foreign salt imported into Great Britain for the sole purpose of curing and preserving fish, shall be subject only to the duty of three-pence: it must however be warehoused in a particular manner (3). Seal skins are also by the modern statutes liable to certain duties, although it was *formerly* provided by the acts for the encouragement of the fisheries, that no duty should be charged on the importation of such articles. (4)

Salt used in curing Fish, Seal Skins, &c.

The provisions that have been mentioned are sufficient to shew the general policy pursued by the legislature with respect to the importation of unmanufactured goods. Other instances of the same description will be discovered on examining the acts of parliament by which duties have been imposed on the importation of foreign goods into this country (5). It should also be

Unwrought Goods in general.

(1) Smith, vol. 3. 150. b. 4. c. 8.

(2) 57 Geo. 3. c. 49. s. 22. 38 G. 3. c. 89. s. 12. Pope, 175. 246.

(3) 57 Geo. 3. c. 49. s. 22.

(4) See the modern acts, 49 Geo. 3. c. 98. Pope, 246. And formerly 31 Geo. 3. c. 26. perp. by 49 Geo. 3. c. 20. And see 35 Geo. 3. c. 92. It should be mentioned that an act was passed in the 11 Geo. 3. c. 50, by which a bounty was given (from 1st Jan. 1772, to 1st Jan. 1781) on the importation of pipe, hogsheads, and barrel staves, and heading, from the British plantations. This act was made to encourage the trade with the plantations, and to furnish the manufacturers of casks for the use of brewers and distillers with a supply of materials, which used to be obtained from foreign nations. 3 Smith W. of N. 154. b. 4. c. 8.

(5) So by 49 Geo. 3. c. 98. hemp dressed, imported in a British-built ship, 5l. the cwt.; not imported in British ship, 3l. 3s. Rough or undressed, &c. 5s. 9d. and 6s. 6d. Beawes, 6 ed. 113. So on hides of buffalo, &c. not tanned or dressed, 6d. and 1s. 6d. tanned, 7½d.; and see formerly 42 Geo. 3. c. 24. 15 Geo. 3. c. 35. Which distinctions, among many others to be found in Pope's Law of Customs, tit. 246, are plainly subservient to the interest of the manufactures. Sometimes a distinction is made for the benefit of the shipping and navigation of this country, as "assafœtida directly from the place of its growth, 6d.; not di-

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observed, as an encouragement to the importation of unmanufactured goods, that on the importation of foreign *manufactures* the duties must in general be paid immediately; whereas unmanufactured merchandize may now be warehoused before the duty has been paid, and a considerable time is allowed for paying the duties, under certain regulations, which we shall presently have occasion to consider.

Naval and Military Stores, Pitch, Tar, Turpentine, Hemp, Flax, Timber, Gunpowder, Arms, &c.

It has also been the practice in former times to grant bounties on the importation of naval stores. In a maritime country like Great Britain, whose strength depends in so great a degree on her naval power, it must always be an object of the greatest importance to obtain an ample supply of naval stores; and it has often been found difficult to secure such a supply from the continental powers in times of the greatest need (1). In the year 1703, the tar company of Sweden absolutely refused to supply the English nation with pitch or tar, although it was paid for in ready money, unless England would allow it to be brought over in Swedish shipping, and at such prices and in such quantities as the company should think proper (2). This occurrence is said to have occasioned the passing of the statute 3 & 4 Anne, c. 10, the object of which was to encourage the production of naval stores in the British plantations in America, and to protect Great Britain from the exactions of foreign potentates, on whose amity and generosity she had been formerly obliged to depend. As the defence and safety of a nation must always be objects of greater importance than any addition to the national wealth, it seems that the most favourable point of view in which a bounty can be regarded, is its subserviency to the naval interests and to the navigation of Great Britain. In the year 1704, the importation into England from the American colonies of tar, pitch (3), rosin, or turpentine; of hemp; of masts, yards, and bowsprits, was rewarded by a variety of pecuniary bounties. On

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rectly from the place of its growth, 1s.; and other instances. Pope, tit. 246." Add one-third and one-fourth of these duties to ascertain those now payable.

(1) See observations, Tucker on Trade, 93.

(2) 2 Macph. An. Com. 724. A. D. 1703.

(3) It has become less necessary to encourage the importation of pitch and tar, on account of a method that has been discovered of extracting them from coal, an invention for which the country is principally indebted to the ingenuity of Earl Dundonald. 3 Macph. An. Com. 648. 25 Geo. 3. c. 42. which vested the invention in Earl Dundonald for the term of twenty years; and the benefits of the method are stated in the act; and see 4 Macph. 73.

the importation of pitch and tar, a bounty was given of £4 per ton; on rosin or turpentine £3; on hemp £6; on masts, yards, and bowsprits, a bounty of £1 on each ton of 40 feet (1). Another statute, 8 Ann. c. 13. was passed on account of these encouragements having been found defective, and her Majesty was enabled to apply £10,000 in employing skilful people and furnishing proper materials in raising naval stores from the plantations. A similar encouragement to that which was offered by the statute 3 & 4 Anne, in respect to the importation of naval stores from America, namely, a bounty of £4 per ton upon pitch and tar, of £3 per ton on turpentine, and £1 per ton on masting timber, was granted by 12 Anne, st. 1. cap. 9. s. 2. in favor of the importation of naval stores from Scotland. It seems, however, to have been insufficient to encourage importation from Scotland, on account of the pine and fir trees of that country being in general found in mountainous parts, and remote from navigable rivers (2). By an act passed in the 8th year of Geo. 1. (3), the duty of £6 per ton on the importation of hemp into England from the American plantations and from Scotland, was continued for the term of sixteen years, and to the end of the next session of parliament. (4)

Encouragements to Importation.

Naval Stores from Scotland.

Bounty on Hemp from America and Scotland continued.

Another bounty was granted by 4 Geo. 3. c. 26. in favour of the importation into this country of hemp, and rough or undressed flax, from the American colonies. It was enacted that the bounty should continue for 21 years, at the rate of £8 for every ton of hemp and flax imported during the first seven years, at £6 for the second period of seven years, and at £4 for the remainder of the time (5). By the same act, the pre-emption of all such hemp and flax was (as usual in such cases), to be offered to the commissioners of the navy, and the space of twenty days was to be allowed for their determination before the importer could be at liberty to sell it to a private person. By the 48 Geo. 3. c. 23. this bounty was continued until the 25th of March 1810 (6). Another bounty was granted by the statute 19 Geo. 3. c. 37. in favour of the importation of hemp from

Hemp and Flax from America.

Hemp from Ireland.

(1) 3 & 4 Ann. c. 10. s. 1 & 2. The pre-emption was given to the commissioners of the navy.

(2) 2 Macph. An. Com. 726.

(3) 8 Geo. 1. c. 12. s. 1.

(4) 3 Macph. 120. See also Smith, vol. 3. 150. b. 4. c. 8.

(5) 4 Geo. 3. c. 26. 3 Macph. An. Com. 400, 1. Smith W. of N. vol. 3. 150, 151. b. c. 8. Tucker on Trade, 93.

(6) See also 26 Geo. 3. c. 53. s. 12. 46 Geo. 3. c. 29. s. 4.

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Ireland. It did not extend, like the act that has been just mentioned, to the importation of flax. In other respects, as to the time of its duration, and the bounty given, as well as the manner in which the act is framed, it bears a striking similarity to the statute 4 Geo. 3. c. 26. It appears that this enactment was partly made to appease a clamour which existed in Ireland, against the manner in which the commerce of that country had been restricted in the British parliament (1). Another bounty was granted by 5 Geo. 3. c. 45. in favour of the importation of *deals*, planks, boards, and timber of certain dimensions, from the American plantations (2). It was with a view to encourage the trade with the American plantations, as well as to furnish the navy with a supply of timber, that this enactment was made.

Deals and other Timber.

Gunpowder, &c.

By an act passed in the 16 Car. 1. c. 21. s. 3. it is rendered *lawful* to import any quantities of saltpetre, brimstone, or any other materials necessary for the making of gunpowder (3). It has also been made lawful, by a late act of parliament, to import into Great Britain by way of merchandize, in any British or Irish vessel directly from Ireland, any gunpowder, arms, ammunition, or utensils of war, the manufacture of Ireland (4). By an act passed in the course of the last war, his Majesty has been empowered to grant *licences* by order in council, whenever it shall be deemed expedient, to allow any sort of masts, timber, or boards, pitch, tar, rosin, hemp, or flax, as shall be specified in any such order in council, to be imported from any place in any ship belonging to any state in amity with his Majesty, and navigated any manner, notwithstanding the provisions of the acts of navigation. (5)

Colonial Produce.

It is enjoined by the navigation act (6), with respect to a great variety of articles, as sugars, tobacco, cotton wool, indigo, ginger, and dying wood (7), of the growth and production of the

(1) 3 Macph. An. Com. 634 to 636. vol. 3. Smith 152. b. 4. c. 8. now expired.

(2) Smith vol. 3. b. 4. c. 8. p. 152.

(3) Pope, tit. 182.

(4) 46 Geo. 3. c. 121. Pope, 181.

(5) 47 Geo. 3. sess. 2. c. 27. Pope, 184.

(6) 12 Car. 2. c. 18. s. 18. Ante, 169 to 264.

(7) By 3 & 4 Ann. c. 5. s. 12. rice and molasses, and by 8 Geo. 1. c. 15. s. 24. beaver skins and furs, are added. By 4 Geo. 3. c. 15. s. 27. coffee, pimento, cocoa nuts, whale fins, raw silk, hides and skins, pot and pearl ashes, of the production of any British plantation in America, shall be imported directly from thence into this kingdom, or some British colony or plantation, under the securities, penalties, and forfeitures men-

Encouragements to Importation.

English plantations in America, Asia, and Africa, that no such articles shall be carried from any of the plantations to any place whatsoever, except such other English plantations as belong to his Majesty, or to England, Ireland, Wales, or Berwick-upon-Tweed. It is well known, that it was the policy of this statute to exclude all other nations from any direct trade or correspondence with the plantations, to secure the benefit of the colonies to the mother country, to which they owed their existence and protection (1). It has been determined, that Gibraltar is not a colony or plantation within the meaning of the navigation acts; and therefore it is not lawful to ship colonial produce from the West Indies to Gibraltar (2). The term plantation has never been extended to the British dominions in Europe, but only to such colonies as have been settled principally for the purpose of raising produce, as those in the West Indies and America. It is quite plain, said Lord Ellenborough in giving judgment, from the whole scope of the navigation laws in the time of Car. 2., that colonial produce could not legally be shipped from the plantations in the West Indies to any part of Europe, except England, Wales, and Berwick-upon-Tweed; though since the unions, the privilege has been extended by particular acts of parliament (3). The fourth and fifth articles of the union with Scotland extend the privileges of the navigation laws to Scotland (4), and the sixth article of the union with Ireland appears to have extended the same provisions to that country. (5)

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tioned in 12 & 25 Car. 2. Pope, tit. 1. rule 14. note a. And see 2 Macph. Ann. Com. 486. See also 8 Geo. 1. c. 18. s. 22. continued by 27 Geo. 2. c. 18. till 1760. as to copper ore. And 3 Macph. 168. And 3 Geo. 2. c. 28. (continued by 27 G. 2. c. 18. till 1760) as to rice from Carolina to any port in Europe southward of Finisterre.

(1) 2 Macph. An. Com. 486. Sir. J. Child on Trade. Tucker on Trade, 93, 94. 97.

(2) Lubboch v. Potts, 7 East, 449.

(3) Lubboch v. Potts, 7 East, 449. 3 Smith, 401. S. C.

(4) 5 Ann. c. 8.

(5) 39 & 40 Geo. 3. c. 67. art. 6. By an act of 7 & W. 3. c. 22. s. 14. it was provided in furtherance of the navigation laws, that no goods whatever, of the growth or product of the plantations, should be put on shore in Scotland or Ireland, unless they had been first landed in England, Wales, or Berwick; so that Ireland was less favoured than other foreign countries, the importation of all goods into Ireland from the colonies having been prohibited; whereas the 18th section of the 12 Car. 2. c. 18. only extended to particular goods, as mentioned in the text. It was therefore enacted by the 4 Geo. 2. c. 15. that it should be lawful to import into Ireland from the plantations, all goods the produce of the plantations, except sugars, tobacco, cotton wool, indigo, ginger, speckle wood or Jamaica wood

Encouragements to Importation.

Patent for an Invention in use Abroad.

In considering the laws by which importation is restrained, it was mentioned that books and other works of art could not be imported without the consent of the author or proprietor during the term in which the sole benefit of an author's labours is secured to him by the laws of this country: It should however be remembered that, except when such rights are interfered with, it is lawful to import works of learning or of art into this country from abroad. It is well known that, in general, a patent can only be obtained for a new invention; but an invention which is new in England may by law be rewarded with a patent, although it may have been in use in foreign parts (1). It is the object of the statute of patent (2), which speaks of manufactures new *within the realm*, to encourage new devices useful to the kingdom, and an equal benefit is conferred on the country, whether the invention has been learned by travel or by study. (1)

Bonding and Warehousing System.

The *importation* of foreign goods has also received a powerful encouragement in the provisions of the warehousing and bonding system.—A considerable improvement has taken place in modern times, in the collection of the duties payable to the crown on the importation of goods into this country. A plan of this nature was suggested by an eminent author on commercial subjects, early in the last century (3), and was afterwards ap-

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fustick or other dying wood, rice, molasses, beaver skins and other furs, copper ore, pitch, tar, turpentine, masts, yards, and bowsprits of the growth of the plantations; by which law, says Macpherson, (3 Ann. Comm. 168.,) Ireland was put on a footing with other foreign countries.

(1) Edgeberry v. Stephens, 2 Salk. 447.

(2) 21 Jac. 1. c. 3.

(3) Tucker, Essay on Trade, 17. 108. 122. It was long ago suggested by Dean Tucker, in his Discourse on Trade, published early in the eighteenth century, that one method for increasing the trade and commerce of Great Britain was to alter the method of collecting our duties upon particular sorts of goods imported. "This he proposed to effect by lodging them in warehouses erected at the public expence, till the importer fetched them away according to his wants, and till he himself paid the duty or caused it to be paid by the person who purchased it of him. This scheme, he adds, would raise a great clamour if enforced by any compulsive law; but if left to each person's free choice, there was thé highest probability that it would universally obtain. Suppose, therefore, that the laws relating to the customs in general should remain as they are; but that permission should be granted to such persons as are desirous of using it, to land their goods in the public magazines, there to remain at the usual moderate rent for cellarage, till such time as they should find it their interest to remove them, and then to pay the

proved of by Sir Robert Walpole and Mr. Pitt; yet it was not until the 43 Geo. 3. c. 132. allowable to deposit goods imported into Great Britain, in warehouses set apart for the purpose,

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Bonding and Warehousing System.

duty. If such a permission were granted to the importers of sugars, rum, wines, brandies, tobacco, raisins, prunes, and currants, it was easy to foresee that almost every one concerned would embrace it. The expence of warehouse-room would be just the same, but the difference between paying the duty all at once upon importation, and paying it by degrees, would be very great, and much to the advantage both of the importer and the public. The importer would be a gainer, as he would not be straitened for money to pay the duties every time his ship arrived, and might keep his goods till he saw a promising market, or might export them to some foreign country if they bore a better price there; and this itself would be a great advantage to the public, as it would render our country a kind of common magazine for others, and as we should get by it all the profits of freight and commission; and persons of intelligence and speculation would then engage in the speculative part of trade; that is, they would buy up all commodities that were cheap in foreign countries, lodge them in their own or the king's warehouses, and then re-export them to those countries where the demand ran highest. But this could not be done on the present system of paying duties. The public would also be benefited by the increase of the trade and the increased cheapness of the goods; when a trade can be carried on with a small stock, the more persons are capable of embarking in it; and when the duties are not paid all at once, but by degrees, as the goods can be sold, the home consumer will buy so much the cheaper; for he will only pay the king's simple duty, the expences of the adventure, and the merchant's single gains upon that adventure: whereas according to the then present way of collecting the revenue, every consumer paid another considerable article, viz. "the gains of the "merchant on the sums advanced "to pay the king's duty." And if the goods have passed from the merchant importer through two or three hands, and from the last retailer to the consumer, then he pays two or three advances the more. The consequence of this is, that trade becomes monopolized by a few rich persons, because there is a greater stock required to carry it on; and as the gains are the greater, so will the temptations to smuggling have the more ascendancy. The learned author proceeds to observe, that the regulations to be submitted to, are not to be compulsory on any person: that the scheme requires no new officers, and may decrease the number, as a very few officers might inspect a set of public magazines: that as to embezzlement by the magazine keepers, it might be prevented by their giving securities, one to the king to enforce their fidelity to him, and another to the mayor, in trust for the merchants, to ensure honesty to them: and in case of embezzlement, the party aggrieved may be at liberty to bring an action in the name of the mayor, or chief magistrate for the time being, and recover treble damages with costs of suit, on proof of such embezzlement."

Sir Robert Walpole also projected a plan for receiving the goods of merchants into warehouses under the joint custody of the proprietor and of government,

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in order to admit of a suspension of payment of the duties, until sufficient time has elapsed to afford an opportunity of bringing the goods to a favourable market. A regulation of this nature enriches the state in proportion as it confers a benefit on trade. It has a tendency to render Great Britain the emporium of foreign merchandize: it induces the merchant to buy goods in foreign parts, as an advantageous opportunity presents itself, in order that he may import them into this country, and deposit them here, until a great demand in other countries shall enable him to export the same goods with advantage:

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and not demanding the payment of duty till a sale was effected. This simple and rational plan was at that day prevented from taking effect by the prevalence of party; but in a more happy period it was re-introduced to the notice of parliament by Mr. Pitt, and carried into practice by his successor, Mr. Addington. If the plan is capable of extension, no means for attaining that end ought to be omitted, since it contains within itself every possible recommendation; it is equally beneficial to the state, to the merchant, and the consumer, and obviates at once the inconveniences and frauds attending the allowance of drawbacks. The act which establishes this system is that of 43 Geo. 3. c. 132. This act, it is justly observed, grants facility to the British merchants, and will convince those of foreign countries that they may send their property to this island, either for security or a market, without restraint, or incurring other than ordinary charges; on the whole it is similar to, or on the footing of, a free port, but superior to some, since there is no *ad valorem* duty paid. Adolphus, Pol. Stat. British Empire, 107, 8.

It is observed by Mr. Pope, in his work on the Customs and Excise, title 245, that the warehousing and bonding system is perhaps as important as any can well be imagined concerning British trade. Commenced comparatively on a small scale, it has been since greatly enlarged, and now embraces a most extensive field. Prior to the passing of the 43d Geo. 3. c. 132., with a few exceptions, when goods were imported, the amount of the duties of customs and excise was by law required to be immediately paid to the king. By the warehousing and bonding system, in some cases twelve, and in others fifteen months were originally allowed for such purpose. The advantages of this postponed period of payment have been so forcibly felt by every merchant, that it would be superfluous, and indeed foreign to the nature of this work, to point them out. This period is now extended to two years, and under certain regulations to five years. Besides which, under the modifications made in the primary plan, goods may be removed from one warehouse to another, and from one port to another, before payment of duty. It appears from Tucker on Trade, 17, that in France the warehousing system existed early in the last century. The last edition of Mr. Pope's valuable work, titles 288, 289, contains a list of the articles that may be warehoused or bonded in Great Britain before payment of duty.

it augments the number of traders, as it decreases the amount of the capital required: it lowers the price of the merchandize to the consumer, as it enables him to purchase the goods on paying only the king's duty in addition to the merchants gains upon the adventure, instead of also paying the gains of the merchants on the sums advanced to pay the king's duty (1). A postponement of the time of paying the duty, is indeed a regulation so obviously beneficial to commerce, that it has not escaped attention in former times (2); but it is only in the present reign, and indeed within a few years, that such a principle has been adopted as a general rule of practice.

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With respect to the time during which the goods may be warehoused, it was provided by the statute 43 Geo. 3., (3) (before which, only one or two articles of commerce were allowed to be warehoused before payment of the duty) that the importer of goods lodged in any warehouse provided according to the act, or secured in any other manner, according to its provisions, should clear them away for consumption in Great Britain, or exportation, *within fifteen calendar months*, to be computed from the day on which the first entry was made (4). It was afterwards considered expedient to enlarge the time, and it was therefore provided by the 49 Geo. 3. c. 106., that it should be lawful for the lord high treasurer, or the commissioners of his Majesty's treasury, to allow by warrant under their hands any of the enumerated goods to remain deposited without payment of the duty for such further time, beyond the period of fifteen months, as they should think reasonable and proper (5). A warrant of the board of treasury, dated the 6th of January 1815, allows all goods which come within the provisions of the warehousing acts, except tobacco, to remain in the warehouse two years from the day of the first entry. Another treasury warrant has extended the indulgence, under certain restrictions, to five years instead of only two years, as formerly allowed (6). The goods, if not taken out of the warehouse at the appointed time, may be sold by the commissioners of the customs to pay the duties, and if insufficient in value to answer the amount of the duties, the goods may be destroyed. (7)

The Time during which Goods may be warehoused.

(1) Tucker on Trade 122, &c. Pope on Customs and Excise, title 245. Adolph. Pol. Stat. British Empire, 2 vol. p. 106.

(2) See the subsiddy act, 12 Car. 2. c. 4. tit. Linen.

(3) 43 G. 3. c. 132. s. 29.

(4) Pope, tit. 245. rule 28.

(5) 49 Geo. 3. c. 106.

(6) Pope, tit. 245.

(7) 43 Geo. 3. c. 132. s. 29.

Encouragements to Importation.

Bonding and Warehousing System.

Place, &c. of Deposit.

The principal regulations as to the *place and manner* of depositing the goods are as follows: Before any goods shall be lodged in warehouses, the same must be duly entered with the proper officer of customs, and regularly landed and examined by the proper officer; and no allowance for damage is to be made, unless claimed by the importer of the goods at the time of the examination; but the law does not require an affidavit, either by the importer or master, immediately upon the goods being landed. (1) The importer of particular articles imported *into London* may lodge the same under the joint locks of the crown and the merchant, in warehouses belonging to the *West India Dock Company* at the Isle of Dogs, without paying at the first entry the importation duties (2). The importer of certain other goods imported *into London* is allowed to lodge them under the joint locks of the crown and the merchant in warehouses appointed for the purpose in the premises belonging *to the London Dock Company*, without paying the importation duties at the time of the first entry (3). And although it has been provided for the security of the revenue, that certain goods shall be warehoused in the warehouses of the West India and London Dock Companies, under the joint locks of the crown and the merchant, yet other articles whose bulk rendered it inconvenient that they should be deposited in such a manner, are allowed to be landed without paying the importation duties at the time of the first entry, on a security of a different nature. The importer of certain other goods imported into London (4) is allowed to land them without paying the importation duties at thetime of the first entry, and to lodge them in such places, and on such rules and restrictions, as the commissioners of the customs in England shall approve and direct, on the said importer entering into a *bond* to his Majesty (5) with one sufficient surety, in double the amount of the duties payable on the importation, with condition that the goods shall be exported in the manner mentioned in the act, or that the importation duties shall be paid at the proper time (6). As the peculiar nature of some goods might require that they should be lodged in warehouses of a particular de-

(1) 43 Geo. 3. c. 132. s. 12. Pope, title 245. Order of Board of Customs, 21 Nov. 1815.

(2) 43 Geo. 3. c. 132. s. 1. and table A. annexed to the act, and Pope, titles 288, 289.

(3) 43 Geo. 3. c. 132. s. 2. and table B. Pope, tit. 288, 289. table B.

(4) 43 Geo. 3. c. 132. s. 3. and table C. annexed to the act. Pope, tit. 288, 289. table C.

(5) Seeas to bonding, post. 551.

(6) See as to the time, ante. 549.

scription, instead of those belonging to the West India and London Dock companies; it was considered expedient to make provisions to meet such an exigency. It has therefore been provided (1) that the importer of certain enumerated goods imported into London may lodge them under the joint locks of the crown and the merchant in warehouses *adapted* for their reception, without paying the importation duties at the time of the first entry; provided it be made appear to the satisfaction of the commissioners of customs in England, that such warehouses are proper for the purpose of securing the goods without risk to the revenue; and provided the importer shall enter into bond to his Majesty, with one sufficient surety, in double the amount of the importation duties, with a condition that the goods shall be exported in the manner mentioned in the act, or that the duties shall be paid within the appointed time (2). The *major* part of those goods to which the provisions of the warehousing system have been extended, is comprehended in the sixth section of the stat. 43 Geo. 3. c. 132., (3), which is the leading act of parliament upon this subject: By virtue of this provision it was made lawful for the importer of certain enumerated goods imported into London, to lodge them in *warehouses provided for that purpose* under the joint locks of the crown, and the merchant, without paying the importation duties at the time of the first entry. It was provided however, by the seventh section, that none of the goods so enumerated should be allowed to be lodged in the manner that has been mentioned, until it should have been made appear to the satisfaction of the commissioners of the treasury, that the warehouses were adapted for thesafe reception of the goods.

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Bonding and Warehousing System.

It should be remembered that the regulations of the warehousing system do not extend to all goods imported into the kingdom, but are limited to particular goods. In the 43 Geo. 3. c. 132. an enumeration of the goods which it was to be lawful to warehouse, in conformity to its provisions, was given, in tables annexed to the act: It was also enacted (4), that if the commissioners of the treasury should deem it expedient that the same provisions should be extended to any other goods, they should cause a

To what Goods extended.

(1) 43 Geo. 3. c. 132. s. 4. table D.; and Pope, tit. 288, 289.

(2) 43 Geo. 3. c. 132. sec 4. and table D. annexed to the act.

(3) See the act, and table E. annexed thereto, and Pope, title 288, 9. table E.

(4) 43 Geo. 3. c. 132. s. 9.

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Bonding and Warehousing System.

list to be published in the London Gazette, and the provisions of the act should then extend to the goods mentioned in the list. This provision has been acted upon, and many goods have been added by various treasury warrants to those mentioned in the 43 Geo. 3. c. 132. (1)

Extended to other Ports besides London.

It was also provided by the 43 Geo. 3. c. 132. that the goods therein mentioned should be deposited at the port of London. But it was at the same time enacted, that it should be lawful for his Majesty, by order in council, to allow the goods to be deposited at any other port of Great Britain, to which it might be reasonable to extend the provisions of the act, provided docks, wharfs, and warehouses should have been built within the port adapted for the reception of the goods (2). It was afterwards found consistent with the security of the revenue that the same advantages should be extended to other ports besides London, although no warehouses had been provided; it was therefore enacted, that whenever it should be made appear to the commissioners of the treasury, that any other port in Great Britain was proper for the purpose, it should be lawful for the commissioners of the treasury, by warrant under their hands, to order that the goods enumerated in the tables marked A. and B. annexed to the 43 Geo. 3. (3), (with the exception of tobacco, and also wine imported from the West Indies), might be landed and lodged in warehouses, or otherwise secured under the joint locks of the merchant and the customs (and also of the excise, in cases where that branch of the revenue is concerned), *at any such port*, without paying the importation duties at the time of the first entry, although no warehouses should have been erected for that purpose within the port (4). A bond was however required to be given, conditioned for payment of the importation duties, or for the exportation of the goods, in the manner required by law (5). It was afterwards enacted by the 46 Geo. 3. c. 137., that *all* the goods enumerated in the 43 Geo. 3., as well as hides and any other goods to be added by virtue of its provisions, might be warehoused or secured in the manner mentioned in the act, without paying the importation duties at the

(1) See Pope, titles 245. 288, 289.

(2) 43 Geo. 3. c. 132. s. 10. Pope, 245. rule 10.

(3) 43 Geo. 3. c. 132. Tables A. & B.

(4) 45 Geo. 3. c. 87. s. 1. Pope, tit. 245. rule 48. See the orders of the board of treasury and the board of customs, Pope, tit. 245. rule 48. note.

(5) 45 Geo. 3. c. 87. s. 2. Pope, tit. 245. rule 49.

time of the first entry, not only at the port of London, but also at any other port in Great Britain to which it might be deemed expedient by the commissioners of the treasury to extend the accommodation.

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Bonding and Warehousing System.

Removal from one Warehouse or Port to another.

The goods may be removed from one of the warehouses or places in which they have been lawfully deposited, to another of the warehouses or places of deposit, at the risk and expence of the importers, on obtaining the permission of the commissioners of customs or excise, as the case may require, and on giving bond for payment of the duties, and complying with certain other regulations (1). It is also allowable to remove the goods from any port in which they have been deposited, to another port, or on board ship for the purpose of exporting them, on complying with certain conditions (2); and so liberally has the statute 43 Geo. 3. c. 132. been given effect to, that all goods, except tea, imported into this country and warehoused, and afterwards exported and then returned, may be re-imported and re-warehoused (3).

Excise Bond, &c.

But goods subject to any duty of *excise* are not allowed to be warehoused before the duties have been paid, or until sufficient security has been given to the excise by bond in double the value of the duties, for payment of the duties before the goods are taken out of the warehouse in which they may be lodged for home consumption; or in case they shall not be taken out of the warehouse for home consumption on payment of the duties, or for exportation, within one year (4) after the date of the bond, then to pay all the duties chargeable on the goods, at the end of the said year, together with all charges that may be incurred by the officers of excise in respect of the goods (5). The payment of the duties after the year will be no bar to a scire facias at the suit of the crown, on a bond of this nature; and therefore where a scire facias was brought on such a bond, and the defendant pleaded that before the goods were taken out of the warehouse, and before the issuing of the writ of scire facias,

(1) 52 Geo. 3. c. 142. s. 1. 57 Geo. 3. c. 116. s. 3. Pope, tit. 245.

(2) 50 Geo. 3. c. 64. 59 Geo. 3. c. 123. s. 3. Pope, tit. 245.

(3) Orders of the board of customs, dated 5 July 1815 and 31 Aug. 1815. See Pope, tit. 1. rule 4. b. and tit. 245. rule 2. p. c.; and see ante 210.

(4) Pope, tit. 245. rule 33 & 28. in notes, see ante 549; the time is extended.

(5) 43 Geo. 3. c. 132. s. 34.

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but after the expiration of the year, he paid all duties and charges incurred by the officers of excise, and that the crown had accepted the same, the plea was held insufficient (1). A warrant from the collector of excise, and the presence of an excise officer, are necessary on warehousing goods subject to any duty of excise; and various other minute regulations must be observed, in order to secure to the crown the payment of the excise duties. (2)

Regulations on taking Goods out.

The conditions on which the goods are allowed to be removed from the places of deposit, are as follows (3): If the goods are intended to be taken out for exportation to foreign parts, the proprietor or exporter may take them for exportation without payment of any duty or customs whatever (4), provided such proprietor or exporter shall, before the goods are taken away, make a due *entry* thereof with the proper officers of customs, and shall, together with the master of the vessel in which such goods are intended to be exported, and one other sufficient surety, enter into *bond* to his Majesty in treble the value thereof, with condition that the goods shall be landed at the respective places for which the same shall have been entered, and that no part of the same shall be relanded in Great Britain, or landed in the islands of Guernsey, Jersey, Alderney, Sark or Man, or the Island of Ferro; which bond shall and may be discharged in the manner hereinafter mentioned, (that is to say) for such of the said goods as shall be entered for or landed in Ireland or any part of Europe not within the Streights of Gibraltar, the condition of the

(1) The King v. Ellis. 1 Price 23.

(2) Goods with different duties are not to be lodged in the same place, 43 G. 3. c. 132. s. 36., are to be stowed so that access can be had, s. 37.—24 hours' notice to excise officer of taking them out, and how delivered by excise for home consumption or exportation, and export bond, s. 38 —presence of excise officer on taking them out, s. 39.—excise permits, s. 40. and export goods to be forthwith shipped, and penalty on relanding, s. 40.—excise account before goods warehoused, and excise officers may take samples, s. 41. and importer may take samples in presence of officer, s. 42.—importer may examine his goods, s. 43.—deficiencies in goods, s. 44.—obstructing excise or customs officer exposes offender to penalty of £200, s. 46.—none of the regulations of excise or customs, as to tea, tobacco, snuff, and spirits, are repealed, s. 47.—former acts are continued, s. 48.—actions are limited to three months by s. 50.

(3) 43 Geo. 3. c. 132. s. 13. see further regulations 59 Geo. 3. c. 123. s. 3. Pope, tit. 245.

(4) Logwood exported in a foreign ship is an exception; and the whole of this provision is subject to a qualification in 43 Geo. 3. c. 132. s. 13. which is stated infra.

bond shall be to bring a certificate in discharge thereof within six months from the date of the bond; for Gibraltar or any foreign parts within the Streights of Gibraltar, within twelve months; for any part of Africa not within the Streights of Gibraltar and on this side the Cape of Good Hope, or in any part of America, within eighteen months; and for St. Helena, or in any place at or beyond the Cape of Good Hope, within thirty months; which said certificate for such goods as shall be landed in Ireland or any part of his Majesty's dominions where any officer of customs shall be resident, shall be signed by the proper officers of his Majesty's customs there, certifying that such goods were there landed; and for want of such officer residing there, such certificate shall then be signed by the governor of such dominions, or in his absence by the deputy governor thereof; and for such goods as shall be landed at any foreign place, such certificate shall be signed by the British consul or vice-consul residing there; and if there shall be no such consul or vice-consul, then such certificate shall be under the hand and common seal of the chief magistrate of such place; or if there be no such chief magistrate, then under the hands and seals of two known British merchants then resident at such place, testifying that such goods were there landed; and such bond may also be discharged upon proof made to the satisfaction of the commissioners of the customs in England and Scotland respectively, for the time being, that such goods were *taken* by *enemies* or perished in the *seas*. If any goods so warehoused or otherwise secured, shall be intended to be taken from the place wherein the same may have been lodged to be used or consumed in Great Britain, the persons so taking away the same shall first pay down in ready money to the proper officers of the customs the full duties of customs due on the importation of any such goods into Great Britain at the time the same shall be so taken out for the purpose of being so used, according to the account taken thereof at the first examination by the officers of the customs, without any deduction or abatement whatever on account of any deficiency arising from waste or any other cause, except any other provision is made for particular instances: provided always, that when by reason of any effect produced by weather, or the time any such goods may have been so warehoused, the same shall not correspond in weight with the first account taken thereof as aforesaid, but shall have increased in weight, such increase in weight shall not subject the same to any forfeiture, but the full duties of customs payable on such excess of weight beyond such first account shall be charged and paid,

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together with the other duties according to such first account so taken as aforesaid (1): provided always, that bond shall be given or entered into with the officer of the customs for the exportation from any such warehouse of any wine or other spirits. The importer of coffee and cocoa nuts is entitled to an allowance at the rate of 2lbs. for every 100lbs. on their being taken out of the warehouse, as a full compensation for all loss, waste, or damage whatever, whether occasioned by garbling or otherwise (2). The statute 43 Geo. 3. (3) provides, that when any goods are intended to be taken out of the warehouse for exportation, the proper officer of customs shall re-examine the goods, and in case it shall appear on such re-examination that the quantity or contents of any such goods are less than the quantity or contents taken by the proper officer of customs at the first examination of such goods, then the importer of such goods, or the person intending to take out the same, shall before the same are so delivered out of the warehouse for the purpose aforesaid, make a due entry of such deficient quantity, and pay to the proper officer of customs the full duties of customs thereon, except as is otherwise especially provided. But where goods on which the full duties have been paid, and which are afterwards delivered from the warehouses, shall be duly exported from Great Britain, the exporter shall be allowed the like drawbacks of the duties of customs as would have been allowed on exportation if the goods had not been warehoused; and also the like drawbacks of the duties of excise, with respect to any wine on which the full duties of excise have been paid; provided they are exported within the space of one year (4) from the time of payment of the full duties (5). The transfer of

(1) By letter from the board of treasury, dated 18 July 1816, it is stated that, in consequence of a memorial, their lordships are pleased to direct that all demands for arrears of duty said to be due for barilla, out of the charge of the officers of customs at the time when the demand was first made, shall cease, and that hereafter duties shall only be demanded for the quantities of barilla, as they may be delivered out of charge, agreeably to the act. By order of the board of customs, dated 15th May 1817, it is stated that it is now the practice of the port of London to re-weigh or re-examine such goods only as are delivered for exportation, and to deliver those for home consumption by the landing account.

(2) 43 Geo. 3. c. 132. s. 14. Pope, tit. 245. note a.

(3) c. 132. s. 22. The searcher of the customs is to give the exporter a certificate of goods exported, 43 Geo. 3. c. 132. s. 24. *Goods* forfeited when relanded after being entered for exportation, s. 27; and forfeiture of *vessel* on relanding goods. s. 28.

(4) The time is now extended, ante 549.

(5) 43 Geo. 3. c. 132. s. 25. Pope, tit. 245.

goods whilst under the locks of the crown is a matter in which the revenue is in no way concerned; and therefore where it appeared that A. had purchased a quantity of goods warehoused by B., but on his applying to export a further part thereof an objection was made in consequence of B. having become a bankrupt, the board of customs considered such objection immaterial. (1)

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If any goods shall be embezzled, or fraudulently or clandestinely concealed in or removed from any warehouse or place where they have been lodged, the goods shall be forfeited, and may be seized by any officer of customs or excise, in cases where that revenue is concerned; and any person guilty of such embezzlement, or to whose hands the goods shall knowingly come, is subject to the same penalties as if the goods had been fraudulently unshipped or landed without payment of duty. (2)

Embezzlement or Concealment or Removal from Warehouses.

No action or suit can be maintained on any account whatever against his Majesty, or the commissioners of his Majesty's customs or excise, or any officer of the customs or excise, or other person employed by the commissioners, for any compensation in respect of the warehoused goods having been destroyed by fire (3). Nor, on the other hand, is any duty of customs or excise to be demanded in respect of goods so destroyed (4). If, however, goods warehoused in pursuance of a treasury order under the provisions of the stat. 45 Geo. 3. c. 88. (5) should be destroyed by fire, it is necessary, in order to enable the owner to claim an exemption from the duties, that every fire place or stove in the warehouses or buildings in which they may be deposited should be bricked up or destroyed, and that the places of deposit should in other respects be rendered secure from fire, to the satisfaction of the officers of customs and excise. (5)

Destruction by Fire.

Any importer who may be desirous of examining the goods belonging to him, is to be allowed to do so upon giving four hours notice in writing to the officer of excise; who is bound to allow the importer, with the concurrence and in the presence of the proper officer of customs, to enter into and remain in the warehouse so long as shall be necessary, during the legal hours of

Importer may examine the Goods.

(1) Pope, tit. 245.
(2) 43 Geo. 3. c. 132. s. 15.
(3) 43 Geo. 3. c. 132. s. 16.
Pope, 245.
(4) 43 G. 3. c. 132. s. 16.
(5) 45 Geo. 3. c. 88. s. 2.

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business, for the purpose of inspecting or examining such goods, or for making such lawful alterations or arrangements, with respect to his property, as may be necessary for its preservation and security, or in order to the sale and disposal of it, provided that no such alterations or arrangements are made as may in any respect tend to lessen the duties, or to impede or embarrass the officers of customs and excise in keeping a true account of it. (1) Coffee, whether intended for exportation or not, may be re-packed in the warehouses, and the damaged part separated from the good, on complying with certain regulations (2).

Warehouse Rent.

The expence of warehouse rent and all other charges is to be paid by the importer; and it was enacted by the stat. 43 Geo. 3. c. 132. s. 17., that if any warehouses should be provided at the charge of the crown for the purpose of securing any of the goods therein described, the importer should pay warehouse rent for the goods, to be estimated according to the usual rate of such rent for the like articles at the port of importation, and that the estimate should be made and the rate of payment fixed accordingly by the commissioners of the customs, subject to the approbation of the commissioners of the treasury (3).

The Docks.

The encouragement afforded to trade in the ports of Great Britain by the establishment of the various *docks*, is also deserving of consideration in this place. The increase of the number of vessels trading with this country suggested the institution of these public places, in which ships might be discharged and receive fresh cargoes with greater expedition and security. Previously to the construction of the docks, the crowded state of the river had occasioned considerable delays, as well as damage, in the unloading of vessels that arrived in the port of London. The quays or wharfs at which the goods were obliged to be deposited were insufficient in extent for the variety of merchandize. The conveyance of the goods in lighters, from the large vessels in which they were imported, to the legal quays, also presented many opportunities for fraudulent practices. The revenue was endangered by the facilities afforded to smuggling; and the owners of the property were constantly defrauded by the carriers and agents through whose hands it passed (4).

(1) 43 Geo. 3. c. 132. s. 43. Pope, tit. 245. rule 42.

(2) 52 G. 3. c. 149. Pope, tit. 245. continued by 57 Geo. 3. c. 8. to 5th April 1820.

(3) 43 G 3. c. 132. s. 17.

(4) See Tucker on Trade, 108, 9.

The inconveniences so sustained were the grounds that prevailed with the legislature, and with those who embarked in these undertakings, in causing the docks to be constructed and established. A publicity is given by means of these institutions to the discharging and loading of vessels, which is of itself a great preservative against peculation and fraud (1). The London and the West India Docks were established nearly at the same time; the London Docks by the statute 39 & 40 Geo. 3. c. 47. (2)., the West India Docks by the 39 Geo. 3. c. 69. (3); the East India Docks were the last in order of time, though they are not inferior in importance to the London or the West India Docks; the statute which established the East India Dock Company is the 43 Geo. 3. c. 126 (4). Other docks of minor consequence have been established for the accommodation of the port of London, as the Commercial Docks, by the statute 50 Geo. 3. c. 207. (5), and the East Country Dock, by stat. 51 Geo. 3. c. 171. Being situated at Rotherhithe in Surrey, the last named two are in general distinguished as the Rotherhithe Commercial Docks, and the Rotherhithe East Country Dock. The docks at the port of London are not the only establishments of this nature; at the other principal ports, docks have been also established, as the Bristol Docks, which are regulated by the statutes 16 Geo. 3. c. 33., 43 Geo. 3. c. 140., 46 Geo. 3. c. 35. (6), 51 Geo. 3. c. 32. (7); the Liverpool Docks, by the 2 Geo. 3. c. 86. (6), 39 Geo. 3. c. 59 (6), 51 Geo. 3. c. 143. (6), 53 Geo. 3. c. 122 (8). The London Dock act provides, that vessels arriving in the port of London laden with tobacco or with rice, not the produce of the East or West Indies, or with wine or brandy not imported in ships from the East or West Indies, shall unlade and land the

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(1) See the preambles to the various acts of parliament cited infra, 39 G. 3. c. 69. 39 & 40 G. 3. c. 47. 43 G. 3. c. 126. and 3 Adolph. 470. 4 id. 565.

(2) Loc. & Per. 20 June 1800. See also 45 G. 3. c. 58. 44 G. 3. c. 100. 46 G. 3. c. 59. 55 G. 3. c. 3., which is printed at length among the Loc. and Per. acts.

(3) Loc. & Per. July 12, 1799. See also 42 G. 3. c. 113.

(4) Loc. & Per. July 27, 1803. See also 46 G. 3. c. 113. 53 G. 3. c. 155. 54 G. 3. c. 228. See observations on the East India Docks. 4 Adolph. 565, 6.

(5) Printed among the Local and Personal acts. See also 51 G. 3. c. 66. 57 G. 3. c. 62.

(6) Only the title of this act is printed in the usual editions of the statutes, see 11 East, 675. 680. Gildout v. Gladstone. Pope, 244, in which the acts and bye-laws are published as officially promulgated.

(7) Public General Act for securing exciseable goods in the port of Bristol,

(8) Many of the principal regulations in the Dock Acts will be found detailed in Pope's Laws of the Customs and Excise, tit. 238 to 244.

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whole of their respective cargoes within the London docks, or on the quays and wharfs belonging thereto; and the duties payable to his Majesty in respect of the said cargoes shall be ascertained at such quays and wharfs and not elsewhere; and in case any such goods shall be landed in any other place than the said quays or wharfs, such goods shall be forfeited to his Majesty, and may be seized by any officer of customs or excise, and disposed of according to law; and the owner or master of the vessel is liable to a forfeiture of £100 for such an offence (1). But so much of the original act of parliament as required that the duties payable in respect of tobacco or snuff, should be ascertained only at the quays or wharfs, has been repealed; and it has been provided, that the duties shall be ascertained under the direction of the commissioners of customs and excise, either within the walls of the warehouses (2) provided for the deposit of such tobacco or snuff, or else only at such quays or wharfs in the docks as the commissioners shall appoint (3). If a vessel has not on board more than 20 pipes of wine or brandy, or 40 hogsheads of either, or a quantity of either not exceeding 20 pipes or 40 hogsheads, or if a vessel has not on board more than 50 barrels or 100 half barrels of rice, it is not compellable to unload such wine, brandy, or rice within the dock, but may unload it at any other place within the port of London (4). If also the cargoes of any such vessel, except as before mentioned, shall consist of fruit as well as of wine or brandy, such vessel (before her entering into the docks for the purpose of unloading such part of her cargo as shall consist of wine or brandy) may unload such part of her cargo as consists of fruit at any place allowed within the port of London (5). If also it should happen that any vessel laden in the manner we have described, cannot be unloaded at the said docks, quay and works, any three or more of the commissioners of customs in England may allow the cargo of any such vessel to be discharged at such other place within the port of London as they shall direct (6). The West India Dock act provides, that vessels which shall arrive from any part of the West Indies into the river Thames with cargoes of West India produce, shall unload and land the whole of their cargoes within the West India Docks, or on the quays or wharfs belonging to them, and the

(1) 39 & 40 G. 3. Loc. & Per. s. 67.

(2) M'Combie v. Davis, 6 East, 538. 7 East, 5.

(3) 44 Geo. 3. c. 100. s. 1. public general act.

(4) 39 & 40 G. 3. c. 47. s. 68.

(5) 39 & 40 G. 3. c. 47. s. 69.

(6) 39 & 49 G. 3. c. 47. s. 70.

duties payable to the crown shall be ascertained only at such quay or wharfs, and the goods being West India produce, in respect of which duties shall be so payable, may be afterwards stored or deposited in the adjoining warehouses, or such other warehouses as the owner or consignees may think proper; and in case any such West India produce shall be landed from any vessel in the West India trade in any other place in or near the port of London besides the quays or wharfs within the docks, the goods are forfeited and may be seized, and the owner or master of the vessel is liable to a penalty of £100 (1). But so much of the cargoes of West India ships as shall consist of tobacco, is to be conveyed, as soon as it conveniently can, after being unshipped in the docks, to the king's tobacco warehouse, at the charges of the West India dock company, who are afterwards to be compensated by the owners, without the king's duties being first ascertained (2). And if at any time West India ships cannot be admitted into the docks, the commissioners of the customs may authorise the cargoes of those particular ships to be landed at other legal quays (3). Ships that arrive from any other part of the world but the West Indies with West India produce on board, may be ordered by three or more of the commissioners of customs, by writing under their hands, to unload and land their cargoes within the docks, or the quay or wharfs belonging thereto, and the king's duties may be directed to be ascertained only at such quays or wharfs; and the forfeiture of the goods, as well as a penalty of £100, is the punishment attached to the disobedience of such an order after it has been delivered on board (4). Outward bound West India ships must take in their cargoes either in the docks, or in the river below the entrance into the canal at Blackwall, on a failure to comply with which regulation, the owner or master of the vessel forfeits £100; but this rule is to be understood with an exception of any vessel engaged to take on board naval stores at the king's dockyard or victualling office at Deptford, for his Majesty's service (5). Vessels that arrive in the Thames from the East Indies or China, with cargoes of produce from that part of the world, are obliged to discharge their cargoes in the *East India Docks*. But any part of the cargo may be directed by three or more of the commissioners of the customs, to be discharged into lighters or other craft in

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(1) 39 G. 3. c. 69. s. 87. but the act is only to last for 21 years.
(2) 39 G. 3. c. 69. s. 88.
(3) 39 G. 3. c. 69. s. 89.
(4) 39 G. 3. c. 69. s. 90.
(5) 39 G. 3. c. 69. s. 91.

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the employ of the East India company, at a place called Long Reach, for the purpose of lessening the draught of water. The goods so discharged being produce from the East Indies or China, in respect of which duties are payable, are to be afterwards deposited in the warehouses of the East India company, according to the laws in force in relation to goods imported from that quarter of the world; and if the master of a vessel in the East India trade should discharge goods, the produce of the East Indies or China, in any place in or near the port of London besides the East India docks, he is liable to a penalty of £500 (1). If at any time East India ships cannot be admitted into the docks, three or more of the commissioners of the customs may allow them to be discharged at such places within the port of London as they shall direct (2). Vessels outward bound to the East Indies or China must take in their cargoes either in the East India Docks or in the river below Limehouse Creek; and disobedience to this rule exposes the master to a penalty of £200 (3). No vessel that has not immediately come from, or that is not immediately bound to the East Indies or China, or that is not employed in conveying goods to or from a ship so circumstanced, or that is not engaged in the repair of the docks, can enter the East India docks, without the consent, in writing, of the court of directors of the East India company; and the master of a vessel who allows her so to enter is liable to a penalty of £50 (4). No vessel is allowed to anchor or lie in the Thames within 200 yards of the entrance to the docks, except such entrance as is appointed for the entrance of vessels, and except in a case where the vessel has come out of the docks within the last twelve hours: if a master does not remove a vessel so unlawfully moored within twelve hours after being required, in writing, by the dockmaster or his assistant, he is liable to a penalty of not more than £10, nor less than £5, for every twenty-four hours the vessel is unlawfully moored (5).

The freighter of a vessel is liable to pay demurrage, according to the terms of the charterparty, although she may have been detained by reason of the crowded state of the London docks,

(1) 43 G. 3. c. 126. s. 63, and see 46 G. 3. c. 113. loc. and per., but only for 21 years. 43 G. 3. c. 126. s. 110.; and see also the late important act 54 G. 3. c. 228. loc. & per.

(2) 43 G. 3. c. 126. s. 64. and see 46 G. 3. c. 113. loc. & per.

(3) 43 G. 3. c. 126. s. 65. 46 G. 3. c. 113.

(4) 43 G. 3. c. 126. s. 66. and see 46 G. 3. c. 113. s. 24. that no ships shall use the docks without the consent of the treasury, by warrant under their hand. Penalty, £50.

(5) 43 G. 3. c. 126. s. 67.

at which it was required by act of parliament that she should be unloaded (1). And, on the other hand, if the freighter of a ship employed to bring a cargo of wine into the port of London, covenant to unload her "in the usual and customary time" at her port of discharge, he is not liable for the detention of the ship in the London docks, if she is unloaded when *in her turn*, has got a birth into the bonded warehouses, though if the duties had been paid down, the goods might have been landed in a much shorter time; because, since the bonding system was introduced, the immediate payment of the duty and delivery of the cargo have ceased to be the usual and customary mode of unloading such a cargo, and bonding and warehousing of wines has become the usual course of business. (2)

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The dock companies are remunerated by means of rates, which they are authorized to take by the acts of parliament. The 39 & 40 Geo. 3. c. 47. s. 59. appoints the rates to be taken by the London dock company (3). The West India dock company is authorized to take rates by the statute 39 Geo. 3. c. 69. s. 137 (4). The fullest provisions in respect of the payment of rates are those connected with the East India dock company, and we shall therefore subjoin a short summary of the regulations. The 43 Geo. 3. c. 126. s. 91. contains a table of the rates payable by the masters or owners of vessels, to the East India dock company, in consideration of the use of the docks, and the trouble which the company takes upon itself (5), as well as of additional rates payable for goods imported from the East Indies or China, and discharged in the docks, whether by the East India company or any other owners. The 54 Geo. 3. c. 228. (6) contains also tables of rates to be charged at the East India docks in London, on goods imported by private merchants from the East Indies, and which are not, on being landed, sent to the East

Dock Rates.

(1) Randall v. Lynch, 2 Campb. 352.

(2) Rodgers v. Forrester, 2 Campb. 483. Burmester v. Hodgson, id. 488.

(3) See table of rates, Pope, tit. 273, 274.

(4) See the tables of the existing rates, Pope, 271, 2. containing the rates on ships entering the West India Docks, and also the rates charged on goods, in two columns, one of the prime rates including rent for 12 weeks, and the other of the rate of rent per week after the 12 weeks.

(5) 43 Geo. 3. c. 126. s. 91. loc. & per. and in particular the beginning and end of the section. By s. 92. lighters and craft for the use of the shipping exempted. By s. 95, 6, 7. the tonnage of the ships is ascertained by the ship's register, as under 26 Geo. 3. c. 60. See also the same table, Pope, 267.

(6) Loc. & Per. see the schedule at the end of the act.

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India company's warehouses; one table contains the rates of tonnage, according to the usage of the East India company, of the principal articles (pieces goods excepted) imported in the company's ships, and which by the acts of 43 & 46 Geo. 3. were those on which the duties and rates to the East India dock company were appointed to be paid: the rates payable on all imports by private ships (the goods not being sent to the East India company's warehouses), but warehoused with the dock company, will be charged according to the same scale of tonnage. It should be noticed that the rates payable to the dock company by the 54 Geo. 3. c. 228. for housing, weighing, &c. are independent of the 2s. the ton for dock dues granted by the 43 Geo. 3. c. 126., and the 2s. a ton for wharfage and loading granted by 46 Geo. 3. c. 113.; and goods that are warehoused will be charged with rent as expressed in a table annexed to the act (1). Articles not enumerated are charged according to their bulk, or weight, and value; articles shot loose in the ship, will be subject to a rate of 1s. per ton for collecting and packing, independently of the charge for packages, cooperage, or sewing up. The East India dock company are not to be liable for loss of weight, damage, or deficiency, should the packages be delivered in the same order and condition as received, unless it can be satisfactorily ascertained to have arisen from neglect or mismanagement in their officers or servants (2). The 54 Geo. 3. c. 228. contains another schedule of the rates for goods exported from the East India dock wharfs, independently of the charge for lading them on board ship, that being already provided for by the acts 43 & 46 Geo. 3. c. 126. & 113. when goods and stores are brought alongside the respective vessels (3); all goods not enumerated in this schedule, are to be charged according to their bulk or weight (3); distinct charges are made in the schedule for housing—for the rent per week—for wharfage and for porterage; persons not wishing to have their goods housed, are to give notice to the dock officers (3). The rates set down only apply to goods brought to the wharf by land; but it often happens that goods conveyed by water are landed by desire of the proprietors, and also for the examination of the officers of the revenue; and they will be subject to a charge for landing, equal to that of wharfage. (3) For goods or stores landed in the import dock, and transported into the outer dock for the purpose of being put into a hoy or lighter, the wharfage and

(1) 54 Geo. 3. c. 228. sched. A.
(2) ibid.
(3) 54 G. 3. c. 228. sched. B. Loc. & Per.

porterage only of these rates form the additional charge. Accidents from fire, the dock company do not guarantee; nor are they answerable for goods in defective packages. (1) Encouragements to Importation. Docks.

At the commercial docks at Rotherhithe, the commercial dock company is allowed to take any sum not exceeding those set forth in a schedule annexed to the 51 Geo. 3. c. 66. (2)

At the east country docks at Rotherhithe, the east country dock company is allowed to take certain rates appointed by 51 Geo. 3. c. 171. (3)

By the old Liverpoool dock acts, certain tonnage duties were payable to the dock company on all vessels sailing with cargoes outwards or inwards, so as no ship should be liable to pay more than once for the same voyage out and home. On the construction of this provision, it was held that one entire duty was imposed upon one entire voyage out and home, if there should be either an outward or an inward cargo in such voyage, but without any advance being made if there should be both; thus a Liverpool ship carrying a cargo out to the West Indies, and bringing another home to Liverpool, was only liable to pay one duty, namely, the duty outwards; and a foreign ship bringing a cargo to Liverpool, and carrying another cargo out, was only liable to pay the duty inwards. But where a ship was built in another port on the account of the owner who resided at Liverpool, at which place she was registered, and sailed to the West Indies without first coming to Liverpool, but brought her return cargo there as to her home; this was held to be one entire and distinct voyage, within the meaning of the acts, for which the duty inwards was payable, and did not privilege the ship from payment of the duties again, when she sailed with another cargo on her outward voyage to the West Indies, though in fact she only used the dock inwards on her first voyage; for the privilege of using the docks with an outward

(1) 54 G. 3. c. 228. sched. B. These tables are also in Pope, tit. 267 to 270, where see also a table of rates for wharfage and work to be done at the East India docks in London; the dock company to load goods, &c., and allow men in stowing, Pope, 270,

(2) Loc. & Per., and 51 G. 3. c. 66. s. 24, 25. and sched. B. Pope, 241 and 275.; and see 57 Geo. 3. c. 62. and 50 Geo. 3. c. 207. loc. & per.

(3) Loc. & Per., but printed in the edition of the statutes 51 G. 3. c. 171. s. 45, 46. to 49. and schedule A. Pope, 246. 270

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and inward cargo, on paying only one duty, was confined to the same voyage out and home (1). Lord Ellenborough laid it down as a rule of construction, that if the words of the act would fairly admit of different meanings, it would be right to adopt that which would be most favourable to the interest of the public, and most against that of the company; because the company in bargaining with the public, ought to take care to express distinctly what payments they are to receive, and because the public ought not to be charged unless it be clear that it was so intended; but when plain words are used, their ordinary sense must be given to them. A modern act of parliament has appointed new tonnage duties to be paid to the trustees of the Liverpool docks, for every vessel coming into or going out of the port of Liverpool, by the master or owner of the vessel, according to its tonnage and the nature of the voyage it undertakes to or from the port of Liverpool; for one arrival, together with one departure of each vessel at and from the port, only one tonnage rate shall be payable (2); provided always, that all vessels arriving in ballast and trading outwards, and all vessels built in Liverpool and trading outwards, shall afterwards on trading inwards pay the rates fixed on vessels trading inwards (2). At the port of Bristol, there are also established dock rates. (3)

Transfer in Docks, and how far Company liable.

Goods in the custody of one of the dock companies may be transferred by the owner to a third person, by an indorsement on the dock warrant; so that if the indorsement has been shewn to the warehouse-keeper, and assented to by him, the property will not pass to the assignees of the original owner, though no application has been made for rehousing the goods, and though no fresh entry has been made in the books of the dock company (4); and it seems that without

(1) Gildart v. Gladstones, 11 East. 675. Judgment reversed on error from C. B.

(2) 51 G. 3. c. 143. loc. and per. Pope, 244. And see the rates on goods, id. rule 19. And see Pope, 281, 282.

(3) Pope, tit. 277 to 280.

(4) Lucas v. Dorrien, 7 Taunt. 278. 1 Moore, 29. S. C. See also Zwinger v. Samuda, 7 Taunt. 265. 1 Holt, 395. S. C. 1 Moore, 12. S. C. decided as to West India dock company; and see the case of Knowles v. Horsefall, Lancashire summer assizes 1819, before Bayley J. A question arose whether a quantity of brandy bonded and warehoused in the name of the importer, would pass to the assignees on his becoming bankrupt, after he had sold the brandy and received part payment, and part of it had been taken away by the purchaser. The learned judge seemed to regard the goods as in the bankrupt's disposition, and recommended that while this case was undecided, all purchasers in similar cases would rebond in their own names.

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any notice to the dock company, the property would be transferred by the mere indorsement of the dock warrant for a valuable consideration; as in the transfer of a mere chattel, there can be no reason why an order for the delivery of the goods should not pass the property (1). At all events, if notice be given to the company, they will become trustees for the person to whom the goods have been transferred by the indorsement of the warrant, and the property would not pass to the assignees of the person by whom they were originally deposited, on the ground of his being the reputed owner (1); no trader would buy goods deposited in the docks without examining the dock warrant (1); but although the goods may have been sold and payment made, yet if no fresh entry has been made in the books of the dock company, and no notice has been given to them of the change of title, they are not liable to an action for delivering the goods to the original owner (2). The dock companies are liable to be sued for the negligence of their servants in unloading goods, in consequence of which the owner sustains damage (3). On a late trial against the treasurer of the London dock company, it appeared that the company provide men for discharging ships in the docks, and that no labourers provided by the owners of the goods to be unloaded can be employed; and the company are liable for the improper acts of their workmen, though they derive no profit from the labour (4). The

(1) Lucas v. Dorrien, 7 Taunt. 289. to 293. Zwinger v. Samuda, id. 265—270. 1 Holt 395. S. C. in which cases the West India dock company were interested. See Favenc v. Bennett, 11 East, 37. M'Combie v. Davis, 6 East, 538. 7 East, 5.

(2) Townsend v. Inglis and others, 1 Holt, 278. see also Lewis v. Smith, esq. Treasurer of West India dock company, 1 Holt, 27.

(3) Gilson v. Inglis, 4 Campb. 72.

(4) Gilson v. Inglis, 4 Campb. 72. The stat. 54 G. 3. c. 228. loc. & per., which fixes the rates payable to the East India dock company, contains a clause at the end of schedule A. that the East India dock company is not to be liable for loss of weight, damage, or deficiency, should the packages be delivered in the same order and condition as received, unless it can be satisfactorily ascertained to have arisen from neglect or mismanagement in their officers or servants. The following clause is also inserted at the end of schedule B. annexed to the act: Accidents from fire the Dock Company do not guarantee; nor are they answerable for goods in defective packages. The 51 Geo. 3. c. 66. s. 20. loc. & per. with respect to the Commercial Dock Company at Rotherhithe, and with reference to certain bridges to be made by them, provides that in case any person shall, through the negligence, carelessness, or omission of the said company of proprietors, their servants or workmen, suffer or sustain any damage or injury exceeding £5, (£5, being recoverable before a

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West India dock act (1) contains a provision which has been also adopted with regard to the London docks (2), that all actions and suits commenced by or on behalf of the company, shall be commenced and prosecuted in the name of the treasurer as the nominal plaintiff; and that actions and suits against the company, or for the recovery of any claim or demand upon, or of any damages occasioned by the company, or for any other cause or causes of action or suit against the company, shall be commenced and prosecuted against the treasurer as the nominal defendant (3). The West India dock act also provides, that the statute 24 Geo. 2. c. 44, for rendering justices of the peace more safe in the execution of their office, and for indemnifying constables and others acting in obedience to their warrants, so far as it relates to rendering justices of the peace more safe in the execution of their office, shall extend to the lord mayor of London, and the aldermen and justices under the authority of the act; and no action or suit shall be commenced against any person, for any thing done in pursuance or under colour of the act, until fourteen days notice has been given in writing, nor after sufficient satisfaction or tender thereof has been made to the party grieved, nor after three calendar months have elapsed since the time when the act or thing for which the suit is brought shall have been done; and the defendant may plead the general issue, and give the act and the special matter in evidence at the trial, and that the matter or thing for which the suit is brought was done in pursuance and by the authority of the act; and if the said matter or thing shall appear to have been so done, or if it appear that the action was brought before fourteen days notice was given, and the proper requisites were complied with, the jury are to find for the defendant (4).

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justice by s. 19.), the whole of the damages may be recovered from the said company of proprietors, or their treasurer, in any of the courts at Westminster, by action of debt or on the case, or by bill, plaint, &c. with costs of suit, and no essoin, &c. shall be allowed. The acts of parliament therefore should be referred to, to ascertain the liability of the Dock Companies in particular cases. Ship owners and masters are liable for damage done by them, by 39 G. 3. c. 69. s. 107. and the other acts, ante.

(1) 39 Geo. 3. c. 69. s. 184.

(2) 39 & 40 Geo. 3. c. 47. s. 150.

(3) The East India dock act provides that actions shall be brought and defended in name of secretary to the company, 43 G. 3. c. 126. s. 112. Also by s. 121. plaintiff shall not recover after tender of amends, nor without 14 days notice of action; and by s. 122. limitation of action for matters done under the act, 3 months. Venue in the county. General issue and treble costs.

(4) 39 G. 3. c. 69. s. 184, 185. West India dock act. See also

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Fourteen days notice of action is rendered necessary by the act of parliament, when the treasurer of the West India dock company is sued in case for an act done by the company which has occasioned an injury to the plaintiff (1); but although notice must be given in all cases before an action can be brought for a trespass or a tort, it may be doubtful whether the provision extends to actions of assumpsit (1). A letter from the plaintiff's attorney to the secretary of the West India dock company, claiming the delivery of goods in the possession of the company, to which the plaintiff was alleged to be entitled, and adding that the writer was instructed to take legal measures if it were not delivered forthwith, is not a proper notice of action; the treasurer of the company appears to be the person to whom notice is to be given; and at all events a letter which may be taken as a communication of courtesy, and leaves it open to conjecture what measures are in contemplation, and against whom they will be brought, is not a notice of action within the meaning of the statute. (2)

Meaning of Term "Importation."

The meaning of the term importation has been already in part considered in the chapter on the navigation laws (3). A vessel is in general considered to have *imported* her cargo when she has come within the limits of the port, *in order to* lay the goods on land (4), as when a ship brought a cargo of baysalt to a haven in England, and sold part of her cargo to another vessel, to which the goods were delivered, and afterwards exported, it was held, that an importation had taken place as well as an exportation, and that duties were payable accordingly on the cargo sold; and it was determined that the discharge of the goods from the vessel in which they were imported on the sale

London dock act, 39 & 40 G. 3. c. 47. s. 151. act of 24 G. 2. c. 44. extended to this act. Limitation of actions 6 months, with 20 days notice required, and tender of amends allowed. General issue and treble costs. And East India dock act 43 G. 3. c. 126. s. 121. tender of amends, and 14 days notice of action, and s. 122. limitation, 3 months. Venue in the county. General issue and treble costs. See also Rotherhithe Commercial dock act, 50 G. 3. c. 207. s. 94. loc. and per. Rotherhithe East Country dock act, 51 G. 3. c. 171. s. 62.

(1) Wallace v. Smith, treasurer of West India dock company, 5 East, 115. Tidd, 6 ed. 30. And see 39 & 40 G. 3. c. 47. s. 151., similar provision as to London Dock company. 1 B. & A. 42.

(2) Lewis v. Smith, 1 Holt. Ca. Ni. Pri. 27.

(3) Ante, 244 to 252.

(4) 2 Chalmer's Op. 280. Leake v. Smith, Bunb. 79. Com. Dig. Trade, C. 1. 12 Co. 18. 2 Price, 385. And see post as to exportation. Score v. the Lord Admiral, Parker, 273.

What an Importation

taking place, was equivalent to putting them on the land, as the delivery was made within the body of the county (1). If, however, goods are wrecked (2), or if they are brought by stress of weather within the limits of the port, and are not disembarked, they are not in general liable to forfeiture as having been imported (3). If foreign goods imported into this country are afterwards exported to foreign parts, they are liable to the usual duties on being again imported. (4)

Restraints of Exportation.

The remaining divisions of the present chapter will be occupied in considering how far and in what manner *exportation* has been either—1. prohibited or restrained—or, 2. favoured and encouraged by our law (5). On a review of the laws that have been made with respect to importing goods into this country, it will be seen that importation has been frequently prohibited from an apprehension that if foreigners were allowed to introduce into the kingdom articles *manufactured* abroad, they might be able to undersell our domestic manufacturers in the home market. So, also, importation has been encouraged, when it was conceived that a supply of the *materials* of mechanical skill was necessary for the welfare of the manufactories. As, therefore, by a natural consequence, the *exportation* of manufactured articles would deserve encouragement, the exportation of the materials of the manufactures would on the same ground be properly restrained. Such has been the policy pursued by the legislature with regard to exportation. The exportation of raw produce has been generally prohibited, while the exportation of manufactured goods has been encouraged by various means. Whether, indeed, the *restraints* imposed on the exportation of unmanufactured goods, at the consideration of which we are now arrived, can be justified on true principles of policy,—whether they have not been calculated to advance the interests of the manufacturer at the expence of the producer of the raw material, as well as of

(1) 12 Co. 18. See 2 Price, 385. 388. 391.

(2) Com. Dig. Trade, C. Cro. El. 534. Vaughan 161. ante 244, 245, 246.

(3) Hardr. 362. 2 Reeves' Hist. of Ship. 198. 200. If a stat. impose duties on goods being imported by way of merchandize, that term should be used in the information; and it is not sufficient to say they were laid on land by way of merchandize. Cro. El. 534, 535. Leake v. Howell. And see ante, 245.

(4) 49 G. 3. c. 98. s. 39.

(5) See Beawes, Lex. Merc. 6 ed. 111, &c.

the public at large,—are reflexions to which it will be proper to attend, when any further alteration shall take place in the law. The arguments upon this subject have been before adverted to, in considering the law as it respects importation (1). We may therefore proceed at once to a consideration of the provisions by which exportation has been *prohibited or restrained.*

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The *woollen manufacture,* it has been before observed, has always been regarded as an object of primary importance. Not only has the importation of woollen articles been restrained, but by a prohibition of the exportation of the materials of the manufacture, a monopoly has been established in favour of the woollen manufacturer against the growers of wool (2). In the reign of Edward III. the exportation of wool was prohibited upon pain of loss of life and member, and of forfeiture to the crown of all the delinquent's possessions (3). It seems, however, to have been intended that this law should not be perpetually in force, as it was declared that it should only continue until any other provision was made by the king and his council. Many other acts of parliament were passed in the same reign, as well as in the reigns of Henry VI. and Edward IV., to prohibit the exportation of wool by foreigners to any place but to the staple at Calais, which was then a dependency on this country; and by a statute of 8 Hen. 6. c. 23. it is provided that no man shall export any manner of thrums, or woollen yarn (4) under colour of thrums, under penalty of forfeiting double the value (4). The exportation of *live sheep* was made felony by a statute 8 Eliz. c. 3., and the offender was to be punished for the first offence with a year's

Exporting Wool, Sheep, and Fuller's Clay.

(1) See ante 514 to 519. and Lord Sheffield's Reports on the Wool Trade, Pamphleteer, vol. 3. 282. vol. 4. 88.

(2) See Lord Sheffield's Reports on the Wool Trade, Pamphleteer, vol. 3. 282. vol. 4. 88. Tucker's Essay on Trade, 63, 64, 65.

(3) 11 Edw. 3. c. 1. 1 Macph. An. 518. See further stat. of the staple, 27 Edw. 3 stat. 2. c. 3. 3 Inst. 95. in which is also cited an old law from the Mirror, c. 1 s. 3. by which the carrying wool out of the kingdom was forbidden. By 38 Edw. 3. c. 6. the 27 Edw. 3. stat. 2. c. 3. was repealed so far as it had made it felony for an Englishman to export wool; and it was enacted, that there should be no forfeiture of life and member, but only of the offender's goods. See also 50 Edw. 3. c. 7. 7 Edw. 4. c. 3. 3 Hen. 7. c. 11. 3 Hen. 8. c. 7. 5 Hen. 8. c. 3. 27 Hen. 8. c. 13. 10 Hen. 6. c. 7. 18 Hen. 6. c. 15. 3 Inst. 96. 3 Edw. 4. c. 1. 4 Edw. 4. c. 2. 12 Edw. 4. c. 5. 6 Ann. c. 9.

(4) 8 Hen. 6. c. 23. Pope, tit. 228. now lawful to export 20,000 weight of worsted or woollen yarn from London to Canada, by 47 Geo. 3. sess. 1. c. 9. 52 Geo. 3. c. 55. & infra.

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imprisonment and loss of his left hand; and the second offence was punishable with death (1). The exportation of sheep and wool, besides many other materials connected with the woollen manufacture, was again made felony by the statute 13 & 14 Car. 2. c. 18., and the exporter was subjected to the same penalties and forfeitures as a felon (2). This law was found inefficacious, principally perhaps on account of the great gains to be acquired by exporting wool, and partly on account of the extreme severity of the punishment with which the offence was visited (3). It was therefore repealed by the statute 7 & 8 Wm. 3. c. 28. s. 4. so far as it made the exportation of wool felony (4). The illegal exportation, however, still continued to be treated with great severity (5); and in the 28th year of the reign of his present majesty, it was deemed expedient to amend the law, and to reduce all the provisions that had been made with regard to exporting wool, into one act of parliament. The 28 Geo. 3. c. 38. repealed all the statutes then in force which related to the exportation of live *sheep*, *wool*, woolfells, mortlings, shortlings, yarn or worsted made of wool, woolflocks, cruels, coverlids, waddings, or other manufactures or pretended manufactures made of wool slightly wrought up, or otherwise put together so that the same might be reduced to wool again, or mattresses or beds stuffed with combed wool or wool fit for combing or carding, or fuller's earth, fulling clay, or tobacco-pipe clay; except those parts of a statute of 9 & 10 W. 3. c. 40. (6), which related to wool shorn, laid up, or lodged within ten miles of the sea-side, within the counties of Kent and Sussex, and to the restrictions in respect of the buying of wool by persons residing within fifteen miles of the sea (6). The exportation of *live sheep* of any description of the breed of Great Britain, or of the islands of

(1) 3 Inst. 101. 4 Bla. Com. 154. Com. Dig. Justices, s. 10.

(2) It is *lawful* to export oxen and cows, or heifers and geldings, and all sorts of swine or hogs, by 12 Car. 2. c. 4. s. 10. 22 Car. 2. c. 13. s. 7.

(3) 2 Macph. An. Com. 497, 8. 7 & 8 W. 3. c. 28.

(4) Com. Dig. Justices, s. 10.

(5) Pecuniary penalties and forfeiture of goods and loss of ship and cargo by owners, if privy, and confiscation, and 3 years imprisonment to masters and mariners, 12 Car. 2. c. 32. 2 Macph. 363, and 8 W. 3. c. 28. and transportation for 7 years, if penalty not paid, 4 Geo. 1. c. 11. s. 6. 12 Geo. 2. c. 21. 19 Geo. 2. c. 34. s. 4. 4 Bla. Com. 151. See 28 Geo. 3. c. 38. s. 88. See also An. 1629, 2 Macph. An. Com. 363, 4. and id. 497. and see as to the Plantations 10 & 11 W. 3. c. 10. s. 1—19. 2 Macph. 706. See Attorney General v. Hines, Parker, 182, where the information was on 12 Car. 2. c. 32. for loading woollen yarn in order to be exported.

(6) But see the 54 Geo. 3. c. 78. and infra.

Restraints of Exportation.

Jersey, Guernsey, Alderney, Sark, or Man, or the causing them to be put in any vessel or boat, to be conveyed out of Great Britain or any of the islands just mentioned (1), is punished with a forfeiture of the animals as well as the vessel in which they are conveyed; and every person concerned is to forfeit £3 for every sheep or lamb taken into a vessel with any such intent, and is to suffer solitary confinement for three months without bail, and also be imprisoned until the forfeiture is paid, so that the whole imprisonment for non-payment of the forfeiture does not exceed twelve months; and a second offence is punished with a forfeiture of £5 for every sheep or lamb, and the imprisonment is to be for six months, and if the penalty should not be paid, a further term not exceeding two years. Some exceptions are made in favour of the carrying of wether sheep with the wool growing thereon, when carried for the necessary food of the ship's crew, and of the transportation of sheep in Scotland from the mainland to islands adjacent to the estates (2). The principal object of the provisions against the exportation of sheep, manifestly is to prevent the English breed of sheep from being propagated in foreign countries. By the 9th section of the statute 28 Geo. 3. c. 38. it is enacted, that every person who shall "convey out of Great Britain, or the islands of Jersey, Guernsey, Alderney, Sark, and Man, into any places out of the kingdom or isles aforesaid, any *wool* whatsoever of the growth of the kingdom, or of the isles aforesaid; or any woolfells, mortlings, shortlings, yarn or worsted made of wool, woolflocks, cruels, coverlids, waddings, or other manufactures (3) or pretended manufactures made of wool slightly wrought up, or otherwise put together so as the same may be reduced to and made use of as wool again, or mattresses or beds stuffed with combed wool or wool fit for combing or carding, or any *fuller's earth*, fulling clay, or tobacco-pipe clay," as well as every person concerned in such an unlawful exportation, shall forfeit 3s. for every pound of wool, or else a gross sum of £50, at the election of the person suing, and shall suffer solitary imprisonment for three months, and if the penalty is not paid, for a further term of twelve months; and a second offence is visited with the same pecuniary penalty, but with imprisonment for the term of six months, and if the

(1) See, as to Cowes in the Isle of Wight, 32 G. 3. c. 32. s. 2.

(2) 28 Geo. 3. c. 38. s. 2—8. Pope, 216.

(3) By 50 Edw. 3. c. 7. no woollen cloths can be exported before fulling; and see 7 Edw. 4. c. 3. 3 H. 7. c. 11. s. 1. 3 H. 8. c. 7. s. 1. 14 & 15 Hen. 8. c. 3. s. 12. 8 Eliz. c. 6. 6 Ann. c. 9. Pope, 199.

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penalty is not paid, for a further term of two years (1). The articles illegally exported are forfeited, together with the carriage in which they are conveyed. The exportation of certain quantities of wool from Southampton to Jersey, Guernsey, Alderney, or Sark, is regulated by particular provisions (2). Worsted or woollen yarn being necessary to complete the assortment of goods for the Indian trade in Canada, it was made lawful for his majesty, with the advice of his privy council, to permit the exportation of any quantity of worsted or woollen yarn not exceeding 5,000 pounds weight in any one year, from the port of London to the province of Lower Canada (3). It is now lawful for his majesty to allow 20,000 pounds weight of worsted or woollen yarn to be transported annually from London to Lower Canada (4). The *inland* commerce of *wool* is also laid under great restrictions, in order the better to ensure a performance of the provisions in force against its being exported. The 54 Geo. 3. c. 78., however, repealed the provisions of the 9 & 10 Wm. 3. c. 40. and 28 Geo. 3. c. 38. so far as they required that a notice should be given or an entry made by the owners of wool shorn or housed or laid up or lodged within ten miles of the sea-side; and so far as they required any certificate of any wool or number of fleeces shorn or housed, or removed or disposed of; and so far as they required a notice or bond to be given, or entry made, or any permit to be taken out, or licensed certificate or other instrument, before the removal of any wool; and so far as they required any certificate to be taken from any officer; and as they prohibited any persons residing near the sea from selling or buying wool without having entered into bond; and as they subjected to forfeiture wool carried towards the sea-side, unless the

(1) Tobacco-pipe clay being very useful, and indeed considered absolutely necessary in the cleansing and improving powdered sugars, and consequently much wanted in the West Indies, it was declared by the 28 G. 3. c. 38. s. 10. that the act should not extend to prohibit the exportation of tobacco-pipe clay from any port in this kingdom to any British sugar plantation in the West Indies, so long as the exportation should be allowed by virtue of 17 Geo. 3. c. 43. s. 4. The 47 Geo. 3. sess. 1. c. 49. legalizes the exportation of fuller's earth, fulling clay, and tobacco-pipe clay, to any place in possession of his Majesty, so long as it is allowed to be exported to the sugar plantations. The 57 G. 3. c. 88. repeals the 28 G. 3. c. 38. so far as it relates to the carrying coastwise of fuller's earth, fulling clay, or tobacco-pipe clay. See 28 G. 3. c. 38. s. 39. 41. 43.

(2) 28 Geo. 3. c. 38. s. 16, 17. Pope, 228.

(3) 47 Geo. 3. sess. 1. ch. 9.

(4) 52 Geo. 3. c. 55., and see as to exporting wool to Ireland, 48 Geo. 3. c. 44.

same had been entered; and as they subjected wool first found within ten miles of the sea to forfeiture, if afterwards lodged within fifteen miles of the sea; and also so far as they subjected any wool, or any horses or carriages carrying the same between sun-set and sun-rise, to confiscation. The provisions now in force against the exportation of wool, will be found condensed in this statute 28 Geo. 3. c. 38. The 31st section provides that if any person shall *press* wool, or any of the other woollen or worsted articles prohibited from being exported, into any truss, sack, or wrapper, or into any chest or cask, contrary to the true intent and meaning of the act, he shall be subject to certain penalties in addition to those inflicted on the exporters of wool; and the court and justices before whom the offender is tried and convicted, shall have power to inflict punishment accordingly (1). The pressing together of yarn made of wool is an offence against the 31st section of the 28 Geo. 3.; and it is not necessary to state in the information that the yarn was in such a state that it might be reduced to and made use of as wool again (2); and it has been decided, that although a defendant has been tried at nisi prius, judgment can only be given by the court out of which the record issued, the judge at nisi prius before whom the trial is had being for this purpose the minister of the court (3). The statute is imperative as to the punishment to be inflicted; and the court are not invested with a discretionary power (4). The 74th section of the statute 28 Geo. 3. c. 38. provides that actions and informations commenced or prosecuted by virtue of the act, shall be tried in any of his majesty's courts of record, by a jury of good and lawful freeholders, "to be summoned out of any other county than that in which the fact is committed." The meaning of the act is, that the trial shall take place in any other county (5). The offence of transporting wool or sheep out of the kingdom to the detriment of our staple manufactures, being usually committed in the night, is known to the law by the name of owling. It is said by Mr. Justice Blackstone to have been prohibited at common law (6).

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(1) 28 Geo. 3. c. 38. s. 31. and see there as to indemnity on discovery of other offenders.

(2) Dyer v. Hainsworth, 3 T. R. 611.

(3) Id. ibid. The King v. Read, 16 East, 404. The King v. Cock, 4 M. & S. 73. The King v. Upper Patworth, 11 East, 411. 1 Chitty Crim. Law, 699.

(4) Dyer v. Hainsworth, 3 T. R. 611. The King v. Cater, 4 Burr. 2026.

(5) Dyer v. Hainsworth, 3 T. R. 611.

(6) 4 Bla. Com. 154. Mirror, c. 1.

Restraints of Exportation.

Foreign Silk or Thread Works, &c. Leather, Tallow, Hides, Horns, &c.

As it is unlawful to sell or offer to sale in England any *foreign* cut work, bone lace, embroidery, fringe, bind strings, buttons, or needle work, made of thread or silk in parts beyond the seas, so it is equally illegal to export those articles (2). The exportation of silk goods manufactured in Great Britain is encouraged, as we shall hereafter see, by bounties (3). It was at one time felony to export *leather, tallow, and raw hides*, out of the kingdom (4). The 18 Eliz. c. 9. s. 2. makes it unlawful to lade or carry in any vessel or otherwise, any leather (5), tallow, or raw hides, with intent to transport them out of the kingdom; and the offence is punished with forfeiture of the leather or hides, besides heavy penalties on the owners and mariners of the vessel. The subsidy act of 12 Car. 2. c. 4. s. 10., however, made it lawful to export *calf* skins dressed or undressed, *sheep* skins dressed without the wool, and all sorts of manufactures made of leather. The exportation out of England of all skins and hides, whether tanned or untanned, of any ox, steer, bull, cow, or calf, except such calf and sheep skins without the wool as might by law be exported, and except leather made into boots, shoes, or slippers, was further prohibited by statute 13 & 14 Car. 2. c. 7. under the penalty of disability to deal in leather in future, and of other pecuniary penalties (6). *Tanned* leather, however, may now be exported by virtue of the statute 9 Ann. c. 6. s. 4. which makes it lawful for any person, whether native or foreigner, to buy in open fair or market, and to export from Great Britain into Ireland, or any foreign parts beyond the seas, all sorts of leather, sheep skins or calf skins, tanned, tawed, or dressed. (7)

s. 3. and see 3 Inst. 104. Hawk. b. 1. c. 48. vol. 1. 443. tit. Owling. Jac. Dict. tit. Owling.

(2) 13 & 14 Car. 2. c. 13. s. 2. Pope, tit. 217. The 5 Geo. 3. c. 39. s. 2. prohibits the exportation from Great Britain to the Isle of Man of wrought silks, Bengals, and stuffs mixed with silk or herba of the manufacture of Persia, China or East India, and calicoes printed or stained there, and cambrics or French lawns, to prevent illicit trading through the medium of that island. But, in general, East India silks may be imported in order that the same may be exported to foreign parts, Pope, title 98.

(3) Post. Pope, 217.

(4) 1 Eliz. c. 8. 18 Eliz. c. 9. repealed by 1 Jac. 1. c. 22.

(5) See now the excise drawback on leather tanned, &c. Pope, 250. The 1 Jac. 1. c. 22. s. 49. declares that the hides and skins of ox, steer, bull, cow, calf, deer, red and fallow, goats and sheep, being tanned and tawed, and every salt hide, is, shall be, and ever hath been reputed and taken for leather.

(6) 13 & 14 Car. 2. c. 7. s. 1—6. The exportation is also a common nuisance, s. 11. Pope, 209.

(7) Originally for 32 years, but made perpetual by 3 Geo. 1. c. 7.

Restraints of Exportation.

The manufacture of *hats* has been provided for by a statute which prohibits the exportation of the materials of the manufacture. The statute 24 Geo. 3. c. 21. enacts that no one shall ship or transport out of Great Britain into foreign parts, any British *hare skins*, or pieces of any such skins, or British hare wool, or British coney wool, or undressed or untawed (1) British coney skins, or pieces of such skins; nor load them on any horse or carriage in order to be exported (2). It has also been made unlawful to stain or dye the skins, as the provisions against the exportation might, by such a practice, have been evaded, and rendered in a great measure ineffectual (3). The exportation of the horns of cattle is also prohibited. The statute 7 Jac. 1. c. 14. s. 4. enacts that no person whatsoever shall sell any English horns *unwrought* to any stranger, or send any English horns unwrought over the sea, upon pain of forfeiture of double the value of the horns so sold or sent. (4)

Watch *Cases* without the Movement and Maker's Name prohibited.

It is also unlawful to export, or endeavour to export, out of England, any outward or inward box, *case*, or dial plate of gold, silver, brass, or other metal, for *clocks* or *watches*, without the movement in or with every such box, case, or dial plate, made up fit for use, with the clock or watchmaker's name engraven thereon (5): and it is also unlawful for any person even to make up any clock or watch without engraving or putting his own name and place of abode or freedom, and no other, on every clock and watch he shall make up; and a breach of this law is punished with the forfeiture of every such empty watch case or watch not so engraven, and the sum of £20, for each offence. (6)

See also 9 Ann. c. 11. s. 39. Pope, 209. Shields v. Blackburne. 1 Hen. Bla. 158. Brown v. Crompton, 8 T. R. 430. It will be seen that the original laws have been relaxed in favour of the tanners. Smith W. of N. b 4. c. 8. vol. 3. 162. See the duties and drawbacks, post, Appendix.

(1) Coney skins dressed or tawed a duty of 1s. 4d. on export of 120 skins. Pope, 249.

(2) The goods are forfeited, and the shipper liable to 500l. penalty, and the master and mariners to 40l. 24 Geo. 3. sess. 2. c. 21. s. 2. Pope, 219.

(3) 24 Geo. 3. sess. 2. c. 21. s. 3.

(4) 2 Pope 206. Smith W. of N. vol. 3. 162.

(5) The name must be engraved *on the movement*. Pope, tit. 221. note b.

(6) 9 & 10 W. 3. c. 29. s. 2. passed on account of empty watch cases having been exported, and made up in foreign parts, with *bad* works, and the names of London makers engraved thereon. The 25 Geo. 3. c. 64. s. 4. enacts, that the exporters *of gold and silver watches* shall mark or engrave in the inside of every watch case, the same numbers and figures which are marked on the works of the watch.

Restraints of Exportation.

Tools, Stocking Frames, &c.

The exportation of the *instruments* and tools of certain trades is also prohibited by several statutes (1). The putting on board, or packing in order to be put on board of any vessel not bound directly to some place in Great Britain or Ireland (2), or lading on board any vessel, or bringing to any place in order to be so laden on board, any machine, engine, tool, press, paper, utensil, or implement used in or proper for the preparing or working the woollen, cotton, linen, or silk manufactures, or goods in which wool, cotton, linen, or silk is used, or any parts of such machine or other utensil, or any model or plan of such machine or other utensil, is an indictable offence, punishable at the assizes or quarter sessions by a forfeiture of the articles illegally exported, a fine of £200, and imprisonment for twelve months and until the forfeiture is paid (3). The *having in possession*, or collecting, obtaining, making, applying for, or causing to be made, any such machines or tools, or models thereof, with intent that the same shall be exported to some other place than Great Britain or Ireland, is also punishable in the same manner (4). It is also unlawful to export from Great Britain to parts beyond the seas, any blocks, plates, or other tools proper for preparing, working up, or finishing the calico, cotton, muslin, or *linen printing* manufactures, or any parts of such tools; and any person endeavouring to put them on board a vessel not bound directly to some port in Great Britain, is liable to be punished with a forfeiture of the tools, as well as a pecuniary penalty of £500, to be recovered in an action of debt (5). The exportation, or putting

(1) See on this subject Smith W. of N. b. 4. c. 8. Vol. 2. Buch Ed. 530, 1. 2 Chalmers Op. 262. 2 Chitty's C. L. 545 to 548.

(2) In 23 Geo. 2. c. 13. s. 3. there is added " or to some other of the dominions of the crown of G. B." Pope, 224.

(3) 21 Geo. 3. c. 37. s. 1. and see 14 Geo. 3. c. 71. which gives an action of debt for 200l. penalty, and 23 Geo. 2. c. 13. s. 3. Pope, tit. 225. Justice's warrant may be issued for seizing the tools, and various other regulations are contained in the act with respect to the offence, as well as the offence of collecting tools in order to export them. 21 G. 3. c. 37. s. 6. The 21 G. 3. c. 37. is entitled an act to explain and amend 14 Geo. 3. c. 71. The 26 G. 3. c. 76. repeals the 14 G. 3. c. 71. and 21 G. 3. c. 37. so far as they prohibit the exportation of wool cards or stock cards of 4s. per pair, and spinners cards of the value of 1s. 6d. per pair used in the woollen manufactures; and see 21 G. 3. c. 37. s. 9. The informer is a competent witness on an indictment under 21 G. 3. though entitled to a share of the penalty, R. v. Teasdale, 3 Esp. 68. 21 Geo. 3. c. 37. s. 8.

(4) 21 G. 3. c. 37. s. 6.

(5) By 22 Geo. 3. c. 60. s. 3. officers of the customs or excise are empowered to seize tools attempted to be exported contrary to the act, s. 4.—a penalty is also imposed on the masters of vessels conniving at

on board a ship in order to be exported, of any frame for making and knitting worsted and silk stockings, and other weaving necessaries, is also prohibited, under the penalty of the forfeiture of the frame attempted to be exported, and also of the sum of £40; one half to the king, and the other to the person who shall sue for the same. (1)

Restraints of Exportation.

The exportation from Great Britain to the British islands in the West Indies, or to any other foreign place, of certain tools and utensils made use of in the iron and steel manufactures, has been also prohibited. (2)'

Tools in Iron and Steel Manufactures.

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the putting the tools on board their vessels in order to be exported s. 5.; and see other regulations, s. 6. action for any thing done in pursuance of the act must be within six months. s. 8.

(1) 7 & 8 W. 3. c. 20. s. 8 & 9. Pope, 204.

(2) The exportation of tools in the iron and steel manufactories was prohibited by 25 Geo. 3. c. 67.; but the enumeration contained in that act is curtailed by 26 G. 3. c. 89. (made perpetual by 35 G. 3. c. 38.) and it is lawful to export from Great Britain to the British islands in the West Indies, or to other foreign parts, any tools or utensils made use of in the iron or steel manufactures, which might have been legally exported before the 25 G. 3. c. 67. except the following articles: Rollers, either plain, grooved, or of any other form or denomination, of cast iron, wrought iron, or steel, for the rolling of iron, or any sort of metals and frames, beds, pillars, screws, pinions, and each and every implement, tool, or utensil thereunto belonging; rollers, slitters, frames, beds, pillars, and screws for slitting mills; presses of all sorts in iron, steel, or other metals, which are used with a screw exceeding one inch and a half in diameter, or any parts of these several articles; or any model or models of any of the before-mentioned utensils, implements, and machines, or any part or parts thereof; and all sorts of utensils, engines, or machines used in the casting or boring of cannon, or any sort of artillery, or any parts thereof, or any model or models of tools, utensils, engines, or machines used in casting or boring of cannon, or any sort of artillery, or any parts thereof; hand stamps, dog head stamps, pulley stamps, hammers and anvils for stamps, presses of all sorts called cutting out presses, beds and punches to be used therewith; piercing presses of all sorts, beds and punches to be used therewith, either in parts, or pieces, or fitted together; scoring or shading engines, presses for horn buttons, dies for horn buttons, rolled metal with silver thereon, parts of buttons not fitted up into buttons, or in an unfinished state, engines for chasing, stocks for casting buckles, buttons, and rings; die sinking tools of all sorts, engines for making button shanks, laps of all sorts, tools for pinching of glass, engines for covering of whips, bars of metal covered with gold or silver, burnishing stones commonly called blood stones, either in the rough state or finished for use, any thing in the 25 Geo. 3. c. 67. to the contrary in anywise notwithstanding. By

Restraints of Exportation.

Seducing Artificers.

It should also be mentioned, as connected with the subject we are now considering, that it is unlawful to seduce *artificers* out of the kingdom. Any person who shall " contract with, entice, persuade, or endeavour to persuade, solicit, or seduce any manufacturer, workman, or artificer in wool, mohair, cotton, or silk; or in iron, steel, brass, or other metal; or any clock-maker, watch-maker, or *any other* manufacturer, workman, or artificer in *any* other of the *manufactures* of Great Britain or Ireland, of what nature or kind soever (1), to go out of this kingdom, or out

s. 2. it is unlawful for any person in the kingdom of Great Britain to export to parts beyond the seas, except to Ireland, or to have in his possession with intent to export, any of the tools and utensils herein-after mentioned; that is to say, Wire moulds for making paper, wheels made of metal, stone, or wood, for cutting, roughing, smoothing, polishing, and engraving glass, purcellas, pincers, shears, and pipes used in blowing glass, potters' wheels, and potters' lathes for plain round, and for engine turning; tools used by saddlers, harness makers, and bridle makers, namely cantle-strainers, side strainers, point-strainers, creasing irons, screw creasers, wheel irons, seat irons, pricking irons, bolstering irons, clams, head knives: and that 25 Geo. 3. c. 67., so far as the same concerns the exporters or possessors of the tools and utensils therein enumerated or described, shall extend or be construed to extend to all and every the exporters or possessors of the tools and utensils herein enumerated and described, as fully to all intents and purposes as if the same were repeated and re-enacted in the body of this act. Doubts arose under this act of parliament respecting the exportation to the colonies of iron tools necessary for plantation and other uses; but in a letter from the secretary of the treasury, dated 10th September 1785, it was stated that the tools enumerated in the 26 G. 3. as not to be exported, were understood to be only such as are used in the manufacture of iron; and it was certainly not intended to prevent the usual supply of tools for our islands and colonies; and that the export to other countries should not be checked, except in the enumerated articles, which are plainly intended for the purposes of the iron manufactory. Pope, tit. 225. note a. The 25 G. 3. c. 67. contains several regulations which are still in force respecting the issuing of magistrates' warrants for the apprehension of offenders concerned in exporting tools used in the iron or steel manufactories, and the method of seizing the tools by custom house officers, and imposes penalties on captains of vessels allowing them to be put on board, and on officers of customs taking an entry of such exportation. s. 1. to 4. Any person having in possession or collecting tools in order to be exported may be bound to appear at the assizes or sessions, and may be punished by forfeiture of the tools, 200l. penalty, and 12 months imprisonment. s. 5. The prosecution for such offences must be commenced within 12 months after the offence committed. s. 7. Any action for any thing done in pursuance of this act must be brought within three months. s. 9. See the act, and Pope, tit. 225.

(1) The King *v.* Middleton, 6 T. R. 739. The indictment in

of the kingdom of Ireland, into any foreign country not within the dominions of the crown of Great Britain, is liable to be indicted and to forfeit £500, to suffer imprisonment for twelve months, and until the forfeiture is paid; any subsequent offence being further punishable with £1000 penalty and two years imprisonment, and a further imprisonment until the penalty is paid (1). The same punishment is inflicted, by a recent statute, upon any person who shall contract with or endeavour to seduce or encourage to go out of Great Britain to parts beyond the seas, any workman employed in printing calicoes, cottons, muslins, or linens of any sort; or in making or preparing any blocks, plates, engines, tools, or utensils, for such manufactory (2). The same punishment is also to be inflicted on those who endeavour to seduce out of Great Britain to any parts beyond the seas (except to Ireland), any workman employed in the iron or steel manufactures of this country, or in preparing the tools for such manufactory (3). Indeed, although it has been usual to make particular provisions with respect to the different manufactures, it seems that the seduction of any manufacturer whatever is illegal, and punishable in the manner that has been just mentioned, by virtue of 23 G. 2. c. 13. (4); and on account of attempts having been made to seduce colliers out of Scotland, it has been recently enacted, that all persons seducing or attempting to seduce colliers from the kingdom of Great Britain, shall be punished in

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that case, which was framed on 23 Geo. 2. c. 13. charged that the defendant unlawfully contracted with a manufacturer of Great Britain in weaving linen cloth to go out of Great Britain into a certain foreign country called America, not being within the dominion of or belonging to the crown of Great Britain; it was objected that some parts of America were in our possession, but the court said they could not presume that it was the continent of America that was intended. 2 Smith 533. note in Buchan Ed.

(1) 23 Geo. 2. c. 13. s. 1. passed to render more effectual 5 Geo. 1. c. 27. s. 1. which it virtually repeals. The King v. Cator, 4 Burr. 2026. See 2 Chitty C. L. 542. Pope, tit. 19. Rule 3 & 8. The statute 25 Hen. 8. c. 9. s. 4. enacts, that no person born within the realm occupying or exercising the said craft of pewterers shall at any time hereafter resort into any strange regions or countries, there to use, teach, or exercise the said craft of *pewterers*, upon pain to lose the privilege of an Englishman. The 5th section enacts, that every person exercising the craft of pewterers in foreign parts shall come to England within three months after warning from the wardens of the craft.

(2) 22 G. 3. c. 60. s. 1.

(3) 25 G. 3. c. 67. s. 6. Pope, tit. 19. Rule 14. Iron and steel.

(4) The King v. Myddleton, 6 T. R. 739, 740.

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the same manner as persons seducing or attempting to seduce manufacturers or other artizans are punishable by law (1).

Person seducing may be arrested.

Upon complaint on oath before a justice, that any person is endeavouring to seduce an artificer out of his majesty's dominions to exercise the trades abroad, or to teach them to foreigners, or that such *manufacturer* has promised, or is *preparing* to go out of the king's dominions for any of those purposes, a warrant may be issued for the apprehension of the person complained of, and on the oath of a credible witness, or his own confession, he may be bound to appear at the assizes or sessions (2).

Artificer to give Security not to depart.

The artificer convicted on indictment of having prepared to go beyond the seas for any of those purposes, is to give reasonable security to the king, at the discretion of the court, not to depart out of his majesty's dominions for any of these purposes, and to be imprisoned until the security is given (2).

Artificer not returning after Warning to be deemed Alien.

Any of the king's subjects within the realm, being an artificer, who shall go into any country out of his majesty's dominions, there to exercise or teach any of the trades or manufactures to foreigners, or any of the king's subjects who shall be in any foreign country out of the king's dominions exercising any of the said trades or manufactures, and who shall not return into the realm within six months after being warned by the ambassador, envoy, resident, minister, or consul of the crown of Great Britain, or other person authorized by him or by one of the secretaries of state, and from thenceforth dwell within the realm, is rendered incapable of taking a legacy devised to him within the kingdom, of being executor or administrator within the kingdom; and is also incapable of taking lands, tenements, or hereditaments within the kingdom, by descent, devise, or purchase; and forfeits all his lands and chattels within the kingdom to the crown; is to be deemed an alien, and is to be out of the king's protection. (3)

Gold and Silver.

The exportation of *gold or silver*, whether in money, bullion, plate, or vessels (4) (except *foreign* coin or bullion of gold or silver exported out of any port of England in which there is a

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(1) 39 G. 3. c. 56. s. 8. 2 Chitty, Crim. Law, 543.

(2) 5 Geo. 1. c. 27. s. 4. Pope, tit. 19. rule 6. Smith W. of N. b. 4. c. 8. vol. 2. 533. Buchan Ed. note v.

(3) 5 G. 1. c. 27. s. 3. 3 Smith W. of N. 168. b. 4. c. 8. 4 Bla. Com. 160. Pope 19. rule 5. See the law and precedents applicable to this subject, Chitty, Crim. L. vol. 2. 542.

(4) 5 Rich. 2. st. 1. c. 2. s. 1. (and see before this act, 9 Edw. 3. st. 2. c. 1. 17 Edw. 3. cited 3 Inst. 92, 4. where it is said to have been

customer or collector, and duly entered at the custom house (1); and except gold and silver coin exported out of this kingdom into Ireland (2); and except molten silver or bullion protected by a treasury licence (3), or by certificate, the principal object of which is to establish that it is foreign bullion, and that no part of it was before it was molten the coin of the realm or clipping thereof, or plate wrought within Great Britain (4); and except watches, sword-hilts, wrought plate, and other silver manufactures, made according to the rules prescribed by act of parliament, and yearly allowed by the commissioners of customs (5);) is also prohibited under the penalty of the forfeiture of such gold and silver, and, in some instances, additional pecuniary penalties (6). The exportation of all *copper* coin, not being the legal coin of the realm, and of all counterfeit gold or silver coin made to resemble the gold or silver coin of this kingdom, or of any other country, or shipping any such coin in order to be exported, from this kingdom to the island of Martinique or any of his majesty's colonies in the West Indies or America, is prohibited under the penalty of £200 and double the value of the coin, which is also forfeited and liable to be seized as other prohibited or uncustomed goods. (7)

Restraints of Exportation.

Silver Manufactures excepted.

Base Coin to West India Islands.

The exportation of *provisions* may also be prohibited at any time by his majesty's order in council. The statute 41 G. 3. c. 2. enacts, that it shall be lawful for his majesty to prohibit

Provisions.

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the old law before the conquest, that no silver should be carried out of the realm. Mirror, c. 1. s. 3. and the regulations of 27 Edw. 3. st. 2. c. 14. s. 2.), afterwards 2 Hen. 4. c. 5. altered by 4 Hen. 4. c. 15. 2 Inst. 741, 2. 2 Hen. 6. c. 6. 17 Edw. 4. c. 1. 3 Hen. 7. c. 8. s. 2. See Parker's Rep. 59. 64, 5, 6. where the information was founded on 5 Rich. 2. stat. 1. c. 2. 2 H. 4. c. 5. and 15 Car. 2. c. 7. s. 12. and it was held that on an information of seizure of British and foreign coins, there is no occasion for a writ of appraisement, or a second proclamation, and judgement may be for the coins themselves.

(1) 15 Car. 2. c. 7. s. 12. See an information, Attorney General v. Lade. Parker's Exch. Rep. 57.

(2) 20 Geo. 3. c. 18. s. 1. and see Pope, tit. 221. rule 24.

(3) 43 Geo. 3. c. 49.

(4) 7 & 8 W. 3. c. 19. s. 6, 7, 8. 6 & 7 W. 3. c. 17. s. 5, 6. and 11. modified by 43 G. 3. c. 49. Pope, 221.

(5) 9 & 10 W. 3. c. 28. s. 1.

(6) See as to molten silver, 7 & 8 W. 3. c. 19. s. 7. and Pope, tit. 201. and the other statutes in note (4) of the last page. And as to the requisite fineness and the marking necessary for gold and silver wares, 12 G. 2. c. 26. s. 1. 5, 6. 24 G. 3. sess. 2. c. 53. s. 8. 30 G. 3. c. 31. s. 1 to 5. 28 G. 3. c. 7. s. 1. 38 G. 3. c. 69. Pope, tit. 213.

(7) 38 G. 3. c. 67. sec. 1 & 2. Pope, 201. rule 25.

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by order in council, for any time limited therein, the exportation of all sorts of provisions or articles of food, either generally or particularly, and by name or description, under such restrictions and regulations as his majesty in council shall think proper; and in like manner to recal such order, in part or in the whole, or make such alteration therein, as he shall think proper. The exportation of provisions after such a prohibition exposes them to forfeiture; every person offending is liable to forfeit treble value, and the vessel is also forfeited and liable to be seized. (1)

Naval and Military Stores.

Arms, Ammunition.

Saltpetre.

A due regard for the safety of the realm against its enemies has induced the legislature to invest his Majesty with power to prohibit by proclamation, for such time as shall be therein expressed, and whenever he shall think fit to do so, the exportation of gunpowder or any sort of arms or ammunition (2). Saltpetre also, on account of its peculiar utility in making gunpowder, is another article which his majesty is allowed to prohibit being exported, or even attempted to be exported, for such time as shall be expressed in his proclamation or order in council, and

(1) 41 G. 3. c. 2. s. 2. The act does not extend to provisions necessary for the use of a vessel, &c. &c. section 4. and the vessel is not forfeited if it can be shown from the smallness of the quantity that it was on board without any want of care in the owner, sect. 5. The exportation of dried and wet ling, cod, &c. beef, pork, &c. is allowed by 38 G. 3. c. 89. s. 108. &c. under certain regulations. Pope, tit. 214. And see as to the exportation of corn, 44 G. 3. c. 69. post, tit. Encouragement of Export; and see as to exporting provisions in breach of an embargo, Delmada v. Motteaux, Park 357.

(3) 12 Car. 2. c. 4. s. 12. no penalty is added. Sect. 10. of the act made it lawful to export by way of merchandize, any *iron* armour, bandeleers, bridle-bits, halbert heads, and sharps, holsters, muskets, carbines, fowling pieces, pistols, pike heads, sword or rapier blades, saddles, snaffles, and stirrups, paying the respective rates appointed for the same; and sect. 11. made it lawful to export gunpowder by way of merchandize when it did not exceed 5l. per barrel, on paying the appointed rates. Pope, tit. 220. To encourage the working of the copper mines, it was made lawful by 5 & 6 W. 3. c. 17. s. 2. to export iron, *copper*, or mundich metal. But the act does not extend to the exportation of pot-metal, gun-metal, shruff-metal, or any old metal, or any mixture therewith, or of any copper or other metal than what is made of English ore only. The 41 G. 3 c. 68. also enacted, that it should be lawful, after signing a definitive treaty of peace, to export copper from Great Britain and Ireland without obstruction from any person under any authority, notwithstanding 33 Geo. 3. c. 2. and 34 Geo. 3. c. 34.

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in such manner and under such restraints as he shall think fit (1). Any saltpetre, gunpowder, or other sort of arms or ammunition, shipped in order to be exported contrary to the king's proclamation or order in council, is forfeited and liable to be seized; and the owner is also to forfeit £100 for every cwt. of saltpetre and gunpowder, £100 for every twenty-five arms, and £100 for every 2 cwt. of any species of ammunition; any person aiding in the shipment being liable to forfeit £100 and treble the value of the prohibited articles (2). His Majesty is also empowered by the statute 33 Geo. 3. c. 2. to issue his proclamation or order in council whenever he shall see cause, to prohibit the exporting, or attempting to export, pig iron, bar iron (3), hemp, pitch, tar, rosin, turpentine, anchors, cables, cordage (4), masts, yards, bowsprits, oars, oakum, oker, sheet copper, and other naval stores; and any such articles or stores, exported, or shipped in order to be exported, contrary to proclamation or order in council, are forfeited and may be seized by any officer of the customs; every person offending is to forfeit treble the value of the prohibited goods, and the ship with her furniture is also forfeited and liable to be seized (5). The statute 34 Geo. 3. c. 34. also empowers his majesty, when he shall see cause, to prohibit, by proclamation or order in council, for such time as shall be therein expressed, the exporting or carrying coastwise, or the attempting to export or carry coastwise, any pot or pearl ash, or other articles which his majesty may deem capable of being converted into naval or military stores, or made useful in increasing the quantity of such stores (6). Several decisions have taken place in our courts of justice in illustration of these provisions. In one case, after a proclamation had been issued by his majesty, allowing the exportation of arms and gunpowder, on condition that security should be given in treble the value, that they should be employed in trade

Iron, Hemp, Pitch, &c. and Naval Stores.

Pot or Pearl Ash.

Decisions.

(1) 29 G. 2. c. 16. s. 1.

(2) 29 Geo. 2. c. 17. s. 2, 3. The master of the vessel who allows them to be taken on board, forfeits 100l. s. 4. His Majesty may prohibit the shipping of saltpetre, gunpowder, arms, or ammunition, to be carried coastwise, s. 5. Pope, tit. 220.

(3) Iron allowed to be exported by 12 Car. 2. c. 4. s. 10. note 3. of last page.

(4) See as to cordage, 54 G. 3. c. 185. post, tit. encouragement to exportation.

(5) 33 G. 3. c. 2. s. 1, 2. Same penalties are imposed on carrying the goods coastwise contrary to prohibition, s. 3 & 4. Act does not extend to the king's ships of war, nor to naval stores necessary to the use of any vessel, nor to ships licensed by the admiralty. s. 5.

(6) 34 G. 3. c. 34. s. 3. The articles and vessel are forfeited, and the offender forfeits treble

Restraints of Exportation.

on the coast of Africa, it was agreed between the owner of a vessel which sailed from Liverpool, and had given the required security, and the owner of an American vessel bound for Charlestown, that the English vessel should deliver to the American, on the coast of Africa, a part of her cargo, which consisted of arms and gunpowder, and it was determined by the court of common pleas that the agreement was contrary to law, and that the American vessel could not be lawfully insured on her voyage from Africa to Charlestown (1). Instead of the stores being employed in commerce on the coast of Africa, they were, in the operation of this agreement, obtained by the Americans. If such an agreement could take place on the coast of Africa, it might also be put in practice even at the mouth of the river Thames; and the consequence would be, that a foreign nation might get a full loading of arms and gunpowder, in violation of the acts of parliament and the king's proclamation (1). When the king had issued a proclamation founded on the statute 33 G. 3. c. 2., prohibiting the exportation of naval stores, and a policy of insurance was made on goods "as should be afterwards specified," and the specification included naval stores amongst other articles, it was held that the voyage was illegal, being contrary to the proclamation; and that therefore the insured, who was the owner of all the goods on board, could not recover on the policy in respect of any part of the cargo (2). However, the statutes (3) only provide, that the articles illegally exported shall be forfeited, together with the vessel in which they are conveyed, and that the exporter shall be subject to certain penalties; but they do not enact that any other part of the cargo which may be contained in the same vessel shall be forfeited or liable to be seized: and in a late case, where the exportation of 150 barrels of gunpowder had been allowed by order in council, and 300 barrels were exported, it was held that the illegal exportation of 150 of the barrels did not render the whole adventure illegal, or preclude the exporter from recovering on a policy of insurance in respect of a loss of that part of the cargo which was protected by the order in coun-

value, s. 4. The king may make exception. Regulations as to the carrying of any such articles, id. Pope, tit. 220. Military clothing for the troops may be allowed to go duty free by a treasury order, 50 G. 3. c. 107. s. 2.

(1) Gibson v. Service, 5 Taunt. 433. 1 Marsh. 119. S. C.

(2) Parkin v. Dick, 11 East, 502. 2 Campb. 221. S. C. 12 East, 304. but see infra, 6 Taunt. 498.

(3) 33 G. 3. c. 2. supra.

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cil (1). Where, however, an agreement had been made between two parties that they should be jointly interested in certain proportions in a voyage to be undertaken by a particular vessel, from Liverpool to Holland, with a cargo of rock salt; and also in a further voyage to South America, with a view of sending out military stores to that country at a time when the exportation of stores was prohibited by order in council, the agreement was considered as contemplating one entire and continued adventure, which was primâ facie illegal; and although the traffic might have become legal by the expiration of the time specified in the order in council, it was held, that it was necessary for a party who sought to establish a claim under the agreement, to adduce evidence to show that a legal adventure was in contemplation. (2)

Encouragements of Exportation.

The methods that have been adopted for the *encouragement of exportation* are, as we have seen, principally the following; namely, 1. Bounties, 2. Drawbacks, 3. The encouragements afforded by commercial treaties with other states, and 4. Colonial Monopolies. We shall treat of these in their order, reserving the last division, on account of the magnitude and importance of the considerations it embraces, to be discussed in a separate chapter.

Bounties and Drawbacks. 1. Bounties. (3)

Bounties and drawbacks may be considered the most obvious and practicable of the encouragements afforded to exportation. *Bounties* however seem exposed to some objections in point of policy. The immediate effect of a *bounty* upon exportation, is to encourage a particular branch of industry at the expence of the rest. If, however, any particular trade be more *deserving* of encouragement than another, it will not fail to reward those engaged in it with a higher rate of profit, and consequently

(1) Keir v. Andraade, 6 Taunt. 498. 2 Marsh. Rep. 196. S. C. a valued policy, 1 Stark. 222, 223. vide tamen 11 East, 502.

(2) Holland v. Hall, 1 Barn. & Ald. 53. See ante as to the carrying of warlike stores by a neutral to a belligerent power, and what articles are to be deemed contraband of war. See also as to the power of the crown to lay embargoes, &c. ante. Delmada v. Motteaux, Park. Ins. 357. 1 Bos. & Pul. 348. 1 Bla. Com. 270.

(3) As to bounties in general, see Smith's W. of N. 2 ed. 1817, by Buchanan, b. 4. c. 1. & 5. Ricardo, Pol. Ec. 375. 3 Sinclair on Revenue, 224, 325. Rees' Cyclopædia. tit. Bounty. Ante, 4 to 7. and 265, 266.

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will not, in general, stand in need of any extrinsic assistance. If a bounty is granted in favour of a trade which would not be worth pursuing without it, it has the effect of diverting capital from a more advantageous employment, in favour of a branch of commerce which is not sufficiently productive to defray its own expences, and afford the ordinary return of profits: it is a tax paid by one part of the nation, not to enrich the other, but to injure the whole state. The bounty enables the merchant, at the expence of the state, to carry on an unprofitable trade, and to export his goods at a losing price.—If, on the other hand, a bounty is granted in favour of those trades, the profit of which is equal to that usually obtained in other branches of commerce, it seems equally objectionable. Let us suppose, for instance, that in a particular country the profit of the woolstapler is equal to that of the silk weaver, the flax dresser, and the generality of other capitalists; that this profit amounts to about 10 per cent. upon the capital employed; but that the legislature, for the sake of giving peculiar encouragement to the woolstapler, grants him a bounty of 5 per cent. to make his profits greater than those of his neighbours. The consequence is, that capitals which would have been employed in the other trades, and which in those trades would have cleared 10 per cent., will now be turned into the trade of the woolstapler, where greater profits will be attainable. The advantage naturally makes the competition so great, that in a short time the trade, instead of continuing to realize 10 per cent. profit, and 5 per cent. bounty, is reduced to the level of the other trades, and settles at a common mark, a little above 10 per cent.; thus realizing 5 per cent. bounty, and something more than 5 per cent. profit. Now the public in this case not only pay more than they would have paid, if they had been left at their natural rate of 10 per cent., but they pay the bounty also; nor does the woolstapler continue to gain the whole amount of that bounty, he realizes no more than the traders in the other branches. All trades, indeed, have gained something by the bounty; for the bounty, by the tendency of all profit to find its level, very quickly diffuses itself through all the channels of commerce; and what was meant as a peculiar encouragement to one trade, has the effect, in a limited degree indeed, of raising the prices in all: but what is that advantage compared to the incontrovertible fact, that all the capitals which have been turned into this channel by the bounty, instead of having been allowed to flow on

Encouragements of Exportation.

through the natural channels where 10 per cent. is to be gained, are forced into a direction where they gain little more than five per cent,. the remaining five being not a profit gained in commerce, but a payment made by the state. Is it, in short, less advantageous to all parties that the public should continue to pay in all purchases a profit of 10 per cent., as by our hypothesis they would do in the natural course of things, than that they should be under the necessity, first, of purchasing at a dearer rate, and secondly, of giving, in addition to the price of the goods, a bounty of five per cent., that the manufacturer may be induced to go on in a trade, which would otherwise have been too barren to allure him? The exceptions in favor of some bounties have already been partially considered. (1)

It is observed by Dr. Smith, that what is called a bounty is sometimes no more than a drawback, and consequently is not liable to the same objections as what is properly a bounty. The bounty, for example, upon wrought silk exported, may be considered as a drawback of the duties upon raw and thrown silk imported. In the language of the customs, those allowances only are called drawbacks which are given upon goods exported in the same form in which they are imported. (2)

Bounties on Silk Goods.

Bounties are granted on the exportation of *silk* goods of the manufacture of Great Britain, exported by way of merchandize. Ribands and stuffs made of silk only are entitled to a bounty of 6s. 8d. the lb.: gauzes made of silk to the same bounty silks and ribands, made of silk, mixed with gold and silver (3),

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(1) Ante, 6, 265, 266.

(2) 2 Smith W. of N. ed. 1817. p. 299. b. 4. c. 5. Rees' Cyclopædia, titles Bounty and Drawback. Vide Stephani v. Burrow. 2 Anstr. 346. and post.

(3) By stat. 8 Geo. 1. c. 15. s. 1. increased by 24 G. 3. sess. 2. c. 49. s. 2. and also by 46 G. 3. c. 110. made perpetual by 58 G. 3. c. 56, which gave an additional 33l. 6s. 8d. for every 100l. Pope, tit. 217. The 8 Geo. 1. c. 15. was made perpetual by 49 G. 3. c. 20. And see 53 G. 3. c. 125. s. 1 & 2. 53 G. 3. c. 30. and infra. By s. 3. of 8 Geo. 1. c. 15. it is provided, that the allowances, i. e bounties, shall not be demanded for such of the said manufactures mixed with gold or silver when they are only so mixed at the edges and the ends of the pieces, or for such of the said manufactures mixed with silk when they are only so mixed at the edges or ends of the pieces; and the onus of proving the quality lies on the exporter. By 9 G. 1. c. 8. s. 9 & 10. the 5 Geo. 1. shall not extend to the making allowance on the exportation of any of the manufactures mixed with silk, except those wherein at least two-third parts of the ends of threads of the warp (by which is meant the length of the piece) be either all

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8s. 10⅔d. the lb.: silk stockings, silk gloves, silk fringes, silk laces, and stitching or sewing silk, 4s. the lb.: stuffs of silk and grogram yarn, 1s. 6⅔d. the lb.: stuffs of silk mixed with inkle and cotton, and ribbands made of silk, mixed with inkle and cotton, (1) 2s. 2⅔d. the lb.: and silks made of silk and worsted, 1s. 1⅓d. the lb. These bounties are paid by the collector of the customs, with the privity of the controller of the ports from which the exportation takes place, on a *debenture* (2) made by the collector, according to the entry of the goods, and the shipping thereof, verified by the searcher, and an oath made by the exporter, that the goods are of British manufacture, and exported or intended to be exported to foreign parts, and not relanded in any part of Great Britain; the exporter, together with one or more persons, first giving sufficient security to the collector of the port in the name and to the use of his majesty, in a penalty to the amount of the value of the goods, that they shall not be relanded or brought on shore again in any part of Great Britain (3). Articles manufactured of *waste* silk, were not formerly held entitled to the bounty on exportation, but only those made up from the silk in its improved state, after the waste had been thrown off. When, therefore, a person who had manufactured articles of that sort of waste silk which is called in the silk trade peg waste, and entered them for export-

silk, or else mixed or twisted with silk in the warp, under a penalty, on the entry or shipment thereof, of forfeiture of the goods and double value. These acts were found ineffectual on account of a practice having prevailed of putting only a small thread of silk scarcely discoverable in the warp, with intent to obtain the bounty; and the 1 Geo. 2. st. 2. c. 17. s. 2. enacts that no bounty shall be allowed under the 5 & 9 Geo. 1. on the exportation of any of the manufactures of stuffs mixed with silk, unless the silk mixed in the warp shall be obvious to the view of the proper officers of the customs; and the silk used therein shall be double the value of the bounty intended to be paid on the exportation of the said manufactures. Vide 53 Geo. 3. c. 30. s. 3. and infra, as to waste silk. Pope, 217. rule 4. and note b.

(1) 53 G. 3. c. 125. s. 2. as to this article.

(2) *Debenture* is a term in trade used at the custom house when the exporter of any goods is entitled to a bounty or drawback; it is the certificate signed by the officers of the customs, which entitles the trader to the receipt of such bounty or drawback. Postlethwaite's Dictionary, tit. Debenture, where the various forms are given. By 55 G. 3. c. 184. they must be stamped, if they do not exceed 100l. with a 5s. stamp; if 200l., 10s.; if 500l., 1l.; if above 500l., 2l.; except debentures on bounty on exportation of linens or sail cloth.

(3) 8 Geo. 1. c. 15. s. 1. The bond to be discharged on certain certificates, &c. See the Act, and Pope, tit. 217.

ation as silk stuffs, he was held liable to penalties for entering the goods under a wrong denomination in order to obtain the bounty (1). But it has been since enacted, that the bounty payable upon the exportation of articles manufactured from raw or thrown silk shall be also paid on articles of the same description manufactured either in the whole or in part from silk, known by the denomination of refuse silk, or waste silk; provided that no bounty is paid on any silk manufactures whatever, unless the value of the goods at the port of exportation is at least four times the amount of the bounty claimed (2). It is also provided by the stat. 53 Geo. 3. c. 125. that the bounties payable upon the exportation of stuffs of silk mixed with gold and silver, stuffs of silk only, stuffs of silk mixed with inkle or cotton, and stuffs of silk and worsted, shall be allowed on such stuffs, although they may be ornamented with *embroidery*, tambour, needlework, lace, or fringe; provided the ornaments attached to the stuffs mixed with gold or silver, and likewise to those made of silk only, are of silk or gold and silver, and that the ornaments attached to the silk stuffs mixed with inkle or cotton, and to those mixed with worsted, are composed of silk, inkle, cotton, and worsted, or of one of those materials.

Encouragements of Exportation.

British-made sail cloth or canvass, fit for or made into sails, and exported out of Great Britain by way of merchandize (3);

Bounties on Sail-cloth and British and Irish Linens to Africa, &c.

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(1) The Attorney General v. Smythies, 1 Wightw. 399.

(2) 53 G. 3. c. 30. Pope, 217.

(3) A bounty of 1d. the ell was granted by 12 Ann. st. 1. c. 16. s. 2. (made perpetual by 45 G. 3. c. 68.) and 1d. was added by 4 G. 2. c. 27. s. 4. Oath that it was made in Great Britain, and that it is not to be relanded, and that no former bounty given, and penalty on relanding. 12 Ann. st. 1. c. 16. s. 3. and see other provisions, Pope, tit. 210. 29 Geo. 2. c. 15. s. 1. 10 Geo. 3. c. 38. s. 2, 4. *British* or Irish *linens* made of hemp or flax of the breadth of 25 inches or more, for every yard which shall be exported to Africa, America, Spain, Portugal, Gibraltar, Malta, (47 G. 3. sess. 2. c. 64.) island of Minorca, or the East Indies, under the value of 5d. the yard, one halfpenny; of the value of 5d. and under 6d. the yard, 1d.; of the valne of 6d. and not exceeding 1s. 6d. the yard, 1½d. 29 Geo. 2. c. 15. s. 1. where see the regulations of the exportation, and Pope, tit. 210. British checked or striped, not exceeding 1s. 6d., and not under 7d. in value the yard, one halfpenny. 10 G. 3. c. 38. s. 2. Pope, 210. Diapers, huckabacks, sheeting, and other species of linen, upwards of one yard English in breadth, of the manufacture of Great Britain or Ireland, and not exceeding 1s. 6d. the square yard in value, the square yard 1½d. 10 G. 3. c. 38. s. 4. By 5 G. 3. c. 43. s. 13. the bounties granted by 29 G. 2. c. 15. are to be allowed upon the like species of linen made in the Isle of Man, duly imported into and and re-ex-

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British and Irish linens made of hemp or flax of certain sizes and values, and exported to particular countries; British checked or striped linen, diaper, huckabacks, sheeting, and other species of linen upwards of an English yard in breadth, and of a certain value, are respectively entitled to bounties on exportation. (1)

Bounties on Cordage.

The exportation of British-made *cordage* by way of merchandize, to any ports except Ireland, the Isle of Man, and the islands of Faro or Ferro, is also rewarded by bounties (2). These bounties are to be paid to the exporter by the collector of customs at the port of exportation, on a debenture to be made out by the collector according to the entry of the goods, and the shipping thereof certified by the proper officer of the customs at the port of exportation. But before the bounties are paid, it is necessary that the exporter shall make *oath* on the debenture, before the collector or comptroller of the port, that the cordage has been wrought up in Great Britain (3) from foreign rough hemp, not the growth or production of the colonies in America, or of the East Indies or China, nor imported by the East India Company, and that the duties were paid on the importation, and that the cordage is really and truly intended to be exported to parts beyond the seas as merchandize, and not for the use of the ship during her voyage, or any future voyage, and not intended to be relanded in any part of Great Britain, or landed in Ireland, the Isle of Man, or the islands of Faro or Ferro (4). Another condition is, that the exporter, together with the master or other person having command of the vessel on board which the cordage is intended to be exported, shall give *security by bond* in the value of the cordage (which security the collector is empowered to take in the name and to the use of his majesty), that the cordage shall not be relanded or brought on shore again in any place in Great Britain, or landed in Ireland, the Isle of Man, or the islands of Faro or Ferro: a security which may be

ported from Great Britain. By 47 G. 3. sess. 2. c. 64. it is enacted, that the same bounties shall be paid on all cotton printed, painted, stained, or dyed in Great Britain, on British and Irish linens brown and white, and on printed linens and sail cloth exported out of Great Britain or Ireland to the island of Malta, as are now due and payable on articles of the like kind exported to Gibraltar.

(1) See last note.

(2) 54 Geo 3. c 185.

(3) By s. 6. of 54 G. 3. c. 185. the onus of proving that the hemp was made in Great Britain and is entitled to the bounty lies, in case of dispute, on the exporter and not the negative on the officer.

(4) 54 G. 3. c. 185. s. 1.

discharged on the production of certain certificates, and in the manner provided for by the act (1). And in order to prevent any inconvenience which might arise from the exportation of cordage, it is provided that no entry shall be allowed to pass for the exportation of such cordage, nor will the vessel having such cordage on board, be allowed to go out of port unless a certificate is produced under the hands of three of the commissioners of his majesty's navy, signifying that such cordage has been tendered to them for the use of the dock yards at the market price of the cordage in London, and that it has been refused by the navy board (2). If, moreover, any of the cordage for which a bounty has been paid, is relanded or unshipped in any place in Great Britain or Ireland, the Isle of Man, or the islands of Faro or Ferro, unless it be in case of distress to save the goods from perishing, a forfeiture of the goods themselves and treble value will be incurred, in addition to the penalty of the bond given on the exportation (3). No bounty is allowed on the exportation of any untarred or twice laid cordage, nor unless the quantity exported is of three tons weight at the least. It is also required that every vessel on board of which any cordage is shipped for exportation in order to obtain the bounty, should have on board, besides the quantity entered for exportation, a sufficient quantity of cordage for the use of the vessel, according to the nature of the voyage, for which no bounty is to be allowed. (4)

Encouragements of Exportation.

Bounties.

Sugar is another article entitled to bounties on exportation. (5) Sugar *refined* within the united kingdom, whether by the operation of claying or otherwise, is entitled to the following bounties on its exportation from any part of the united kingdom, by an act which is to be in force until the 5th of July 1820: viz. the bounty on refined sugar called bastards, or refined loaf sugar broken in pieces, or being ground, or powdered sugar, is 30s. the cwt. The bounty on other refined sugar in loaf complete and whole, or lumps duly refined, or on such sugar pounded,

Bounties on refined Sugar (5)

(1) 54 G. 3. c. 185. s. 1.
(2) 54 G. 3. c. 185. s. 4.
(3) 54 G. 3. c. 185. s. 7. as to a searcher's opening packages, &c. See s. 5.
(4) 54 G. 3. c. 185. s. 3. otherwise the officers of customs are to prevent her from sailing, ib.

(5) And see as to raw sugar, 47 G. 3. sess. 1. c. 22. s. 8. continued by 54 G. 3. c. 24.; and see 48 G. 3. c. 12. s. 2. 54 G. 3. c. 24. s. 7.; and see as to sugar candy, 46 G. 3. c. 109. s. 2. and 58 G. 3. c. 34. and *infra*; and see as to drawbacks on sugar, 2 Smith W. of N. 260. 5 G. 3. c. 45. s. 14.

Encouragements of Exportation.

Bounties.

crashed, or broken, and on sugar candy, is 46s. the cwt., and an additional bounty of 8s. a cwt. is paid on *double* refined sugar (1). All sugar refined otherwise than by the operation of claying, is entitled to these bounties, without regard to any regulations relating to the operation of claying (2). On the exportation of refined sugar in any other than a British vessel, a diminution of the bounties takes place; and there is paid 1s. 6d. less bounty for every cwt. of sugar in loaf complete and whole, or lump duly refined; 1s. less bounty for every cwt. of refined sugar called bastards, or refined loaf sugar broken in pieces; and 1s. less bounty for every cwt. of refined sugar being ground or powdered sugar, than would have been payable if the sugar had been exported in a British vessel (3). Before the bounties are paid, or any debenture is made out for them, it is necessary that the refiner, if he be not the exporter of the sugar, should make oath before the collector or other proper officer of the customs, that he sold the sugar, expressing the quantity, and the time when, to the person intending to export it, and that he verily believes such sugar was produced from muscovado sugar imported from the American plantations, or from sugars the produce of the East Indies, and that the duties were paid at the time of the importation; and the exporter must then make oath as to the identity of the sugar; and before the money due upon the debentures is paid, the exporter is to make oath that the sugars have been duly exported, his majesty's searcher also certifying the shipment thereof, and a due compliance with the legal requisites; and whenever the refiner is the exporter, he is to make oath of the due exportation and of the other particulars just mentioned, except what relates to the sale of the sugars. It is necessary also, in order to obtain the bounties, that the sugar should be packed in packages of certain dimensions (4), a regulation principally introduced to prevent frauds in relanding the goods in Great Britain, after they have been entered for exportation, and obtained the bounty; and in order to effectuate the same object, a bond must be given (as is usual with respect to articles on the exportation of which a bounty is paid), in treble the

(1) 58 G. 3. c. 34. and table annexed to the act. Pope, 221. rule 16.; and see before 56 G. 3. c. 76.

(2) 58 G. 3. c. 34. s. 5.

(3) 43 G. 3. c. 11. s. 3. not repealed by 58 G. 3. c. 34.

(4) By 58 G. 3. c. 34. s. 8. refined sugar from Great Britain in 200lb. casks, and sugar candy from Great Britain in 56lb. packages; and see 23 G. 3. c. 76. s. 6. 47 G. 3. sess. 1. c. 22. s. 5.

amount of the bounty, that the goods shall not be landed again in Great Britain, the Isle of Man, or the isles of Ferro, and a forfeiture of the goods, and treble value, and of the vessel in which they are conveyed, is the penalty attached to such an unlawful reimportation. (1)

Encouragements of Exportation.

Bounties.

Beer or ale exported as merchandize, when above the price of 16s. the barrel exclusively of the duties payable in respect thereof, and brewed in Great Britain from malted corn, and whereon the duties for strong beer or ale shall be proved to have been charged or paid, is entitled to a bounty of one shilling a barrel, when barley is at 24s. per quarter (2). The price of barley at the port of exportation is the rule by which the bounty is to be governed, and not the average price throughout the kingdom (3). Before the bounty is paid, an oath must be taken that the beer was exported as merchandize, and that no part of it was for the ship's use, and that the excise duty has been charged on it as strong beer. (4)

Bounties on Beer

Salted provisions are also entitled to certain bounties on exportation. All these bounties are to be found in the statute 43 Geo. 3. c. 69. sched. C. tit. Salt, which has been varied by the statute 52 Geo. 3. c. 42. and the acts referred to in that statute. (5)

Bounties on Salted Provisions.

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(1) 23 G. 3. c. 76. s. 6. And see 32 G. 3. c. 43. 58 G. 3. c. 34. s. 3. 5 G. 3. c. 45. s. 17. &c.; and see 23 G. 3. c. 76. s. 6, 7. 47 G. 3. sess. 1. c. 22 56 G. 3. c. 76. 55 G. 3. c. 31. s. 3. 32 G. 3. c. 43. s. 2.; and also particularly s. 8. and 46 G. 3. c. 109. s. 2, 3. Pope, tit. 221.

(2) 43 G. 3. c. 69. sched. C. tit. Beer. 1 G. 3. c. 7. s. 6. 42 G. 3. c. 38. s. 7. 59 G. 3. c. 53. Pope, tit. 250.

(3) Whitbread v. Brooksbank, Cowp. 66. Lofft, 532. S. C.

(4) 38 G. 3. c. 51. s. 4. gives oaths to be taken by the brewer or his known servant, or the exporter or his known servant. 2 G. 3. c. 14. s. 4.; and see 42 G. 3. c. 38. s. 19. and 41 G. 3. c. 91. s. 5. 59 G. 3. c. 53. s. 15. where the laws made to prevent frauds will be found. Pope, tit. 193.

(5) They are as follows:— Dried cod fish, ling, or hake, commonly called haberdine, which shall contain in length 14 inches or upwards from the bone in the fin to the third joint in the tail of every such fish, the cwt. 3s. Wed cod fish, ling, or hake, the barrel of 32 gallons, 2s. Salmon, the barrel of 42 gallons, 4s. 6d. Full red herrings, the barrel of 32 gallons, 1s. 9d. Clean shotten red herrings, the barrel of 32 gallons, 1s. Dried red sprats, the last of 10,000, 1s. Pilchards or scads, the vessel of 50 gallons, 7s. Pilchards which shall be duly shipped and exported directly to any of the British West India islands, or to any place in the Mediterranean,

Encouragements of Exportation.

Corn free (1).

No bounty is now payable on the exportation of corn. The statute 54 Geo. 3. c. 69. enacts, that after the passing of the act all *bounties* as well as *duties* payable upon the exportation of corn, grain, malt, meal, or flour (2), from any part of the United Kingdom, as well as all *restrictions* on the exportation thereof, under any act of parliament, shall cease; and that it shall be lawful for any person to export at all times, from any part of the United Kingdom, any corn, grain, meal, malt, and flour, without payment of any duty; and, on the other hand, that no person shall be entitled to a bounty in respect of such an exportation. By a provision in the act of parliament which is annually passed to continue the duties on malt, it is enacted, that there shall be allowed to maltsters and makers of malt for exportation, for every 20 quarters of barley or other corn or grain made into malt for exportation, an allowance of 30 quarters after the same is dried and made into malt, and no more, although by their steeping or watering the same the 20 quarters

in casks of 32 gallons or upwards, a bounty in due proportion to the bounty or bounties by this act payable for pilchards exported to foreign parts in casks of 50 gallons; viz. the 50 gallons, 8s. 6d. Beef or pork, which shall have been salted in England with salt that shall have paid all the duties due thereon in England, the barrel of 32 gallons, 5s. Beef or pork, which shall have been salted in Scotland with foreign salt that shall have paid all the duties due thereon, without any mixture of British or Irish salt, the barrel of 32 gallons, 5s.

(1) See the observations and history of the exportation and importation of corn, Anderson's His. Com. Index, tit. Corn.

(2) By order in council, dated 23d July 1814, it is stated, that *biscuit bread*, peas, and beans were by mistake omitted to be inserted in the above act, and by such order the said articles are permitted to be exported on the same terms and conditions as the other articles enumerated in that act. By order in council, dated 14 September 1814, it is stated, that grots, scotch barley, pearl barley, and corn were by mistake omitted to be inserted in the act, and the exportation of those articles is to be allowed on the same conditions as the other articles enumerated in such act, until the pleasure of parliament can be taken on the subject, it being intended to apply to parliament to remedy the above omission. No act has since been passed on the subject. Pope, tit 202. note a. The policy of restrictions and encouragements on the exportation of corn will be found discussed in 2 Smith W. of N. 269. Ed. 1817. b. 4. c. 5. Paley's Mor. Phil. 2 vol. 398. Rees' Encyclopædia, tit. Bounty. Supplement to Encyclopædia Britannica, tit. Corn Laws and Trade. Ricardo on Pol. Economy, ch. 22. The latter author demonstrates with much force and clearness that a bounty on the exportation of corn, though it tends to lower its price to the foreign consumer, has no permanent effect on its price in the home market. See also as to the old corn laws, Lofft's Rep. 534.; and see Buchanan's Observations on the laws regulating the exportation of corn. 4 Smith W. of N. 147.

may be run out to a quantity exceeding the 30 quarters (1). If malt shipped in order to be exported is relanded in any part of Great Britain, the malt is forfeited, and treble the value thereof. (2) Encouragements of Exportation.

Drawbacks form a less exceptionable encouragement to exportation than bounties. These, it has been suggested, were originally introduced to encourage the carrying trade (4). A drawback is an allowance or rebate of duty on the exportation of such of *our own* manufactures as have paid duties on their production; or on the exportation of such *foreign* merchandize as have paid a duty on being imported into this country (5). The drawback allowed upon the exportation of those domestic manufactures which are subject to a duty at home is by far the most part useful and just, inasmuch at it merely restores the level which had been deranged by the necessities of internal taxation, and enables foreigners to purchase at its real price that part of our stock which, if it had been loaded with the charges necessary among ourselves, by reason of our peculiar situation and of our extensive public establishments, they could have purchased more cheaply of other sellers. But upon the same principle these drawbacks are useless, if not injurious, where goods are exported to places where our own merchants or manufacturers have a *monopoly*, as, for instance, to our own colonies, since it is probable that those countries, being allowed to buy their goods no where else, would buy as largely, or almost as largely, whether those goods were encumbered with the tax or not. Except in such cases as these, drawbacks being but the repeals of taxes, are for the most part amply justifiable. Thus there can be little objection to a drawback upon the exportation of those foreign goods which are subject to a duty on importation; for this drawback only restores the equilibrium, and enables the merchant to export the goods at the price at which they came into the country, except, of course, with the addition of the exporter's profit. Drawbacks, in general, therefore, are justifiable, not as artificial derangements of the natural course of trade, for II. Drawbacks (3).

(1) 56 G. 3. c. 3. s. 8. 58 G. 3. c. 3. s. 8. no bounty is now allowed on export of malt except to Ireland. Pope, 202.

(2) 58 G. 3. c. 3. s. 9.

(3) As to drawbacks in general, see Smith, W. of N. B. 4. c. 1. & 4. Buchanan ed. 1817. id. Buchanan addl. or 4th vol. 165.

(4) Smith, W. of N. B. 4. c. 4. Postlew. Dict. tit. Drawback.

(5) Postlethw. Dict. tit. Drawback; see Rees' Cyclopedia, titles Bounties and Drawbacks.

Encouragements of Exportation.

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the sake of encouraging one branch with peculiar partiality, but as restorations of the natural equilibrium when it has been previously deranged by artificial means, such as duties and taxes. The introduction of the bonding and warehousing system, which, we have seen, prevents the advance of duties, has materially reduced the frequency of questions respecting drawbacks, which are a return of duty previously advanced. In considering the subject of drawbacks, it is not necessary that we should enumerate all the goods on which a drawback is allowed, with the rates at which the allowances are made, but only that we should notice the permanent and general regulations of the system. (1)

Drawbacks on Export of Foreign Goods in general.

The foreign goods entitled to drawbacks are enumerated in schedules annexed to the statute 59 Geo. 3. c. 52 (2). The drawbacks on *foreign* goods constitute by far the greater proportion of those allowed. That statute repealed all the drawbacks as well as all duties respecting the revenue of *customs* then in force, and substituted others in their stead, which were to take place after the 5th of July 1819 (3). A clause in the statute provides, as is usual in acts of parliament of a similar nature, that all the new duties and drawbacks shall be managed by the same rules as the drawbacks and duties that formerly existed, except so far as any special provisions are made by the act.

Where the particles of a commodity have changed their shape and appearance, by being manufactured, between the times of importation and exportation, it seems that on account of the numerous frauds which might otherwise be practised without the possibility of detection, a drawback is not claimable unless expressly given by the terms of the act, as in the case of sugar; and therefore Peruvian bark imported in the rough state and pulverized here, is not entitled to the drawback on being again exported (4). The real state of the commodity when imported must appear by the entry,

(1) See older statutes and decisions, Com. Dig. Trade, C. 4. Adolphus Pol. Stat. British Empire, vol. 2. 111. Rees's Cyclopedia, titles Bounties and Drawbacks.

(2) The present customs consolidation act. See as to the old subsidy act, 12 Car. 2. c. 4. reg. 2. and other acts, and their principle, 2 Smith, W. of N. ed. 1817. p. 259. See 49 Geo. 3. c. 98. 54 G. 3. c. 36. Pope, tit. 248. as to goods from the East Indies.

(3) For the amount of the drawbacks therefore on the exportation of foreign goods, see the schedule to 59 Geo. 3. c. 52.

(4) Stephani v. Burrow, 2 Anstr. 346.

for the drawback is not to be allowed, unless the goods are duly entered for exportation (1). The solicitude of the legislature respecting this circumstance has been considered one proof, that they intended the drawback should not be allowed, unless the entry for exportation and that upon importation were the same, or in other words, unless the article remained unaltered. (2)

Encouragements of Exportation.

Drawbacks.

It is enacted by the statute 26. Geo. 3. c. 59. that, in order to entitle the exporter of foreign wine to the drawback on exportation, it should be necessary to observe particular regulations besides those commonly practised: the attendance of excise officers is necessary at the packing up of the wine, and six or twelve hours notice must be given to them accordingly; the packages are to be secured and marked as the commissioners of excise shall direct; an account is to be taken by the excise officers, which is to be returned to an officer at the port of exportation; notice must be given to the excise officer of time and place of shipping the wine, of the names of the vessel and master, of the place to which it is to be shipped, and of the quantity and description of the wine. A variety of other minute particulars is to be observed on the exportation, as to the form of the bond, of the oath and the debenture, and in other respects, which it would occupy too much space to enumerate here, and for which the reader is therefore referred to the act of parliament. (3)

Foreign Wine.

With respect to the drawback on the exportation of *foreign goods*, it has been a general regulation ever since an act passed for the consolidation of the customs, in the year 1787 (4), that the exporter shall not be allowed any drawback of the duties of customs paid upon the importation into Great Britain, nor receive any repayment or allowance of the same, unless the goods be duly, and in the manner theretofore practised, entered for expor-

Foreign Goods must be shipped within three years, &c.

(1) Id. ibid. 27 G. 3. c. 13. s. 3.

(2 Stephani v. Burrow, 2 Anstr. 346. It has been held, that if goods are imported by one and shipped for exportation by another, who sells to a third, reserving the drawback, it is lost, for the property must not be charged after the shipping or exportation, Cook v. Attorney General, Parker, 266. Com. Dig. Trade C. 4. But see post. And it has been held, that no drawback is due for pepper unless exported within the year, or prevented by accident. Id. ibid.

(3) 26 G. 3. c. 59. s. 46 to 49; and see 59 G. 3. c. 52. Pope 226. 246.

(4) 27 G. 3. c. 13. See before this act 12 Car. 2. c. 1. 7 G. 1. c. 20. s. 10. 2 Smith W. of N. ed. 1817. 259. b. 4. c. 4. Com. Dig. Trade, C. 4.

Encouragements of Exportation.

Drawbacks.

Certificate.

Oath.

tation with the proper officer of customs (1), and actually shipped on board the vessel in which the goods are intended to be exported, within the space of *three years* from the time such goods were originally imported, (the time of such importation to be accounted from the master's report inwards of his ship), and unless sufficient proof be also first made by *certificate* from the proper officers of the due entry and payment of the duties inwards upon such foreign goods (2), and by the *oath* (2) or affirmation of the merchants importing and exporting the same, verifying and affirming the truth thereof, and the name of his Majesty's searcher or under-searcher in the port of London, or of the searcher of any other the outports, testifying the shipping thereof to be exported, and unless such drawback be duly claimed within two years after such goods shall be shipped for exportation. (3)

Excise Drawbacks and Home Goods.
Beer and Ale.

The statute 43 Geo. 3. c. 69. s. 1. repealed all drawbacks as well as duties of excise in force at the time of passing that act, and substituted others in their stead (4). Beer or ale for which the duty has been paid, when exported to foreign parts as merchandize, if above the price of 16 s. the barrel, exclusively of the duty, and not being two-penny ale mentioned in the 7th article of the treaty of union with Scotland, is entitled to a drawback of 13 s. 11 d. the barrel (5). In order to obtain the drawback, it must be exported and shipped off in the presence of a sworn gauger or other sworn officer appointed by the commissioners of excise (after notice given at the excise office within the limits of which it was brewed, of the place whence it is to be shipped), and the gauger or officer is to certify the quantity shipped off to the commissioners and officers of excise where the entry is made, whose duty it is, after proof that the duties have been charged or paid, to make the allowance or drawback for the same to the brewer within one month after exportation (6).

(1) 2 Anstruther, 353. ante, 598, 599.

(2) See Forms, 24. Mr. J. Ash. Pap. Books, 82, 83. Whitmore v. Papillon, argued 6th June 1788. It seems to have been held in that case, that the regulation of 27 G. 3. c. 13. s. 3. did not apply to the temporary allowances on foreign wines granted by 27 G. 3. c. 31. as was contended by *Wood* for defendants, and that they might be claimed though the wines were exported more than three years after importation.

(3) 27 G. 3. c. 13. s. 3. Pope, tit. 11.

(4) See the excise drawbacks in tables appendix, Pope, tit. 246 to 251.

(5) 43 G. 3. c. 69. sched. C. Pope, 250. and see 56 G. 3. c. 108.

(6) 1 G. 3. c. 7. Pope, tit. 193.

Encouragement of Exportation.

Drawbacks.

Before any drawback is received for beer entered for exportation, in order to obtain the drawback, the brewer or his known servant, or the exporter or his known servant, as the case may require, must take an oath on the debenture before one or more of the commissioners of excise, or before the proper collector or other officer of excise, stating that the specified number of barrels of strong beer was put on board the vessel, and exported therein as merchandize to be spent beyond the seas, and no part thereof for the ship's use, and that the excise duty has been charged on the beer as strong (1). When the exporter is not the same person as brewed the beer, he must take an oath that to the best of his knowledge and belief, "the above mentioned barrels of strong beer were put on board the vessel and exported therein as merchandize to be spent beyond the seas, and that no part of it was for the ship's use, and that by the officer's certificate it appears the beer was brewed by E. J. (of such a place), common brewer, and the excise duty charged on the same as strong beer" (2). The officers of customs are to charge every master of any vessel in his victualling bill, with such a quantity of strong beer or ale as such a number of men are used to spend in a voyage of the same nature as that on which the ship is bound, in respect of which quantity no drawback is allowed. When the necessary requisites have been complied with, the exporter has a right to require that he should be admitted to take the oaths in order to obtain the drawback, and without being subject to any deduction in respect of the beer to be charged in the victualling bill of the master for the consumption of the voyage, on which it is provided, as before observed, that no drawback is to be allowed. A decision took place on this subject a few years ago in the court of king's bench, when a rule was obtained for a writ of mandamus to compel the collector of excise for the port of Liverpool to administer to a Mr. Paton the oath just mentioned, and thereupon to allow or repay the excise duty on five barrels of strong beer exported in the ship Irlam, George Kenzar master. This application was made on behalf of Gladston and Paton, brewers at Liverpool, the shippers of the beer, on which the duty had been before paid, and which was shipped for exportation to Barbadoes. The objection made was that the whole quantity of

(1) 38 G. 3. c. 54. s. 4. Pope, 193. and see other forms Reg. ibid. and see other regulations 59 G. 3. c. 53. s. 15. which require an oath that the beer was brewed from malt which has paid the duty, and the place of brewing, &c.

(2) 38 G. 3. c. 54. s. 4. Pope, in. 193.

Encouragements of Exportation.

Drawbacks.

beer shipped on board the Irlam, was no more than adequate to the consumption of the crew during the voyage. The general question raised was, whether the officers of excise were warranted in refusing the drawback to any general shippers of beer on board a certain ship until a sufficient quantity had been shipped by the master for the consumption of the voyage, on which no drawback was allowed, or until the master should have paid the duty on such quantity? This question had not before occurred in the port of Liverpool; but it appeared from the affidavits of several of the excise officers in the port of London, that it had always been the invariable practice there, upon making out debentures for the drawback on strong beer exported, to deduct from the total quantity of strong beer shipped in any ship going from the port of London to the West Indies, to be exported as merchandize, a certain quantity of the said beer for the stores of the ship to be spent on the voyage, unless a sufficient quantity (which was estimated in proportion to the number of persons on board) was shipped as stores; and to make out the debenture for the drawback only upon the residue, apportioning it amongst the different shippers. This practice appeared to have originated with a view to obviate fraud in the master shipping his beer as merchandize for exportation and foreign consumption, in order to get the drawback, and afterwards using it as sea stores. The court, however, reprobated the practice, and held that the exporter of beer was entitled to a drawback in respect of the whole quantity shipped for exportation, without any deduction in respect of the quantity to be consumed in the vessel. Lord Ellenborough, Chief Justice, said, this beer has been shipped for exportation, and therefore is within the terms of the act. It is said, however, that the officers find a difficulty in charging the master with the duty; but they must recover from the master what they are entitled to recover, and cannot, in order to obviate this difficulty, take the beer of one person to pay the duty of another: Does not the right to the drawback attach on shipping the beer on board? And if the master afterwards use it on board, that cannot divest the right of the shipper to the drawback. It would require an express provision to make him liable for the duty. It appears to me that the practice applies solely to the beer shipped by the captain, but does not apply to a distinct quantity shipped by a general shipper. I cannot see why the officers should not charge the master in the victualling bill with so much duty as he is likely to consume of the beer shipped by others. Mr. Justice Bayley

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said, the officers may prevent the master from clearing out, unless he pays all the duties that he is bound to pay. The construction now put on the act is, that no person is entitled to the drawback on beer shipped for exportation, until the duty is paid by the master upon a quantity equal to the supposed consumption of the crew on board. (1)

Encouragements of Exportation.

Drawbacks.

Cider and Perry.

The exporter of cider and perry by way of merchandize must, in order to obtain the drawback, give sufficient *security* before the shipping thereof, that it shall be shipped and exported, and not relanded; the security is to be given to the collector of customs at the port of exportation in his majesty's name (2). The exporter must also produce a *certificate* from the collector who received the duty of such cider or perry, that the duty has been paid; and make *oath* before the officer or collector, that the cider or perry is the same as that mentioned in the certificate; thereupon the collector or chief officer of the port of exportation is to give to the exporter a certificate or *debenture* expressing the true quantity of the cider or perry so exported or shipped for exportation; which certificate or debenture, being produced to the collector or other officer appointed to receive the duty in the place where the cider or perry was exported, it is his office to pay the duty to the exporter; and in case the collector or other officer shall not have any money in their hands arising by the duties on cider and perry to pay the same, then the commissioners appointed for executing the 4 Geo. 1. are required to pay the same out of the duties arising by that act. Before the exporter can receive the drawback on cider entered for exportation, he or his servant must make oath on the debenture, before one of the commissioners, or an excise collector or officer, that to the best of his knowledge and belief, the cider was put on board the vessel, and exported therein as merchandize to be spent beyond the sea, and no part of it for the ship's use, and that the duties of excise have been charged, and have not been repaid. (3)

(1) The King v. Cookson, 16 East. 376.

(2) 4 G. 1. c. 3. s. 8. Pope, 213. Goods forfeited on relanding, besides penalty of bond. s. 9. Intention not to export causes a forfeiture. See ante.

(3) 38 G. 3. c. 58. s. 5. Pope, tit. 193. The regulations as to drawback on export of *bricks* are similar. *Proof*, on oath, that the duties are paid or secured, enables the collector to give a *certificate* of quantity and duty, on production thereof, and oath by exporter of identity, the collector of the port gives a debenture, on production of which the drawback is paid.

Encouragements of Exportation.

Drawbacks.

Glass(1), Export Bond.

On the exportation of *glass* it was required by the statute 26 Geo. 3. c. 77, that in order to obtain the drawback, the exporter should, before the shipment of the glass, give sufficient security, (to be taken by the excise officer in his majesty's name, in treble the value of the duty intended to be drawn back, that the particular quantity of glass intended to be exported should be shipped and exported, and should not be unshipped, unloaded, or laid on land, or put on board any other vessel in Great Britain, except in a case of shipwreck or other unavoidable accident (2). On a scire facias being brought on

24 G. 3. sess. 2. c. 24. s. 18. Pope, tit. 195. 250.

The drawbacks on hides and skins, boots and shoes, &c. &c. are regulated by the stat. 56 G. 3. c. 110. 9 Ann. c. 11. s. 39 to 44. Pope, 250. Where a general merchant undertook without reward to enter a parcel of leather goods for another, and made the entry of two cases, one of which was his own, under the denomination of wrought leather instead of dressed leather, which it ought to have been, and the cases were seized, it was held that as he had taken the same care of the goods which he had agreed to enter as if his own, and had not received any reward, and was not of a profession or employment which implied skill in what he had undertaken, he was not liable to an action for the mistake. Shiells v. Blackburne, 1 Hen. Bla. 158.

The drawback on linens is governed by 10 Ann. c. 19. s. 94. to 96. (transferred to the excise by 25 G. 3. c. 74. s. 16.: but by order of the Board of Customs, dated 8th August 1785, the goods are nevertheless to be entered outwards, and inspected by the officers of customs). And see as to stamps, &c. sec. 97, 8. and 12 Ann. st. 2. c. 19. s. 15. and 5 G. 1. c. 11. s. 15.; on linens, cottons, &c. by 25 G. 3. c. 72. s. 28.; on silks, by 25 G. 3. c. 74. s. 19. Pope, 210.

The drawback on paper is regulated by stat. 10 Ann. c. 19. s. 57. to 59.; on paper made in Great Britain by 34 G. 3. c. 20. s. 28, 29, 30. 33. Pope, 212. tit. Paper.

Wrought plate became entitled to a drawback by the stat. 25 G. 3. c. 64. s. 3. It was extended to all manufactured plate, whether intended as merchandize or not, by stat. 52 G. 3. c. 59. on certain conditions. Pope, 213.

The drawback on rum and other spirits is regulated by the stat. 34 G. 2. c. 28. s. 6. 9, 10. 19 G. 3 c. 22. s. 7. made perpetual by 42 G. 3. c. 20.; and as to the size of the casks, see the modern provision of the 57 G. 3. c. 123. s. 16. Pope, 219.

Tin is free from duty on exportation under 30 G. 3. c. 4. s. 1, 2. Pope, 222.

Tobacco is subject to various regulations on exportation, in order to obtain the drawback, by 29 G. 3. c. 68. s. 127, &c. Pope, 223.

Foreign wine is entitled to a drawback under the conditions in 26 G. 3. c. 59. s. 46. 50. Wine for naval officers, 33 G. 3. c. 48. s. 1. 45 G. 3. c. 45. 53 G. 3. c. 44.

(1) See the regulations as to drawback on glass, 26 G. 3. c. 77. s. 3. 55 G. 3. c. 13. s. 3. 7, 8, 9, 10. 54 G. 3. c. 97. s. 6. 52 G. 3. c. 77. s. 5 to 10. 56 G. 3. c. 108. s. 3 to 7. 58 G. 3. c. 33 17 G. 3. c. 39. s. 37. 51 G. 3 c. 69. s. 41. Pope. tit. 205

(2) 26 G. 3. c. 77. s. 3.

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a bond which had been taken by virtue of the statute, the defendant pleaded that two puncheons (which formed part of the goods, for the shipment of which the bond was conditioned), had been regularly shipped according to the act—and that he was about to have shipped the remainder of the glass, but that before he could accomplish his purpose, the officers attending the shipment came on board the vessel, and after examining part of the glass caused the part shipped to be relanded, and the whole of the glass, to be unpacked; that it was seized and not restored to him by the commissioners till long afterwards, and that so he had been prevented from shipping and exporting the glass, according to the condition of the bond. It was determined that the facts pleaded by the defendant constituted a sufficient excuse for not shipping and exporting the goods, and that though an intention to defraud the revenue by shipping improper goods with the glass, as well as by shipping a less quantity than had been alleged in the notice, was suggested in the replication no answer was given to the defendant's plea (1). The difficulty experienced in this case, on the part of the Crown, arose from the form in which the bond was taken; no time was limited with which the shipping and exportation of the goods should take place; and a statute has been lately passed to remedy the defect. It is now part of the condition, that the glass shall be shipped within one month next after the date of the security, although it is lawful for the commissioners of excise, on being satisfied that the shipping of the glass within the time specified in the condition, has been prevented by unavoidable accident, to give further time, not exceeding three months, for that purpose; and such an indulgence will not extend or vary the effect of the instrument, unless the commissioners in their discretion shall forbear to put the bond in suit for a breach of the condition (2).

Notice of Shipment to obtain Drawback on exciseable Goods.

Every person intending to export goods, in respect of which any *drawback of excise* may become payable, is required to give to the proper officer of excise of the port where the same shall be shipped, six hours at least before the shipment is made, a *notice* thereof in writing, in which notice shall be specified the number of packages intended to be shipped, with their respective marks and numbers, and the quantity (3) and quality of the goods contained in each such package, and the rate and amount of the

(1) Attorney General v. Pole, 1 Price, 389.

(2) 55 G. 3. c. 11. s. 7.

(3) Wilson v. Sutton, 2 Anstr. 444. on corn bounty.

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duty paid thereon, and shall also specify the quay or place where such packages and goods are lying, and from which such goods intended to be shipped, and the time when such shipment is intended to take place, and the name of the vessel in which the same are intended to be shipped and exported, and of the master or commander thereof, and of the particular place to which such goods are intended to be exported, and also the place or situation of the port in which such vessel shall then lie and may be found; and if any goods shall be shipped for exportation without such notice being so given, or without such officer having been allowed an opportunity of inspecting and examining the same in consequence of such notice, or if such person shall not, after the expiration of such six hours, or after the officer has finished his examination of the goods, ship them with all due diligence and without any unnecessary delay, no drawback shall be payable in respect thereof (1). The notice must state, as part of the description of the goods, the rate and amount of the duty paid on the goods, as well as of the drawback claimed on the exportation, and the value of the goods if sold for home consumption; and no drawback is to be paid on goods packed or shipped for exportation of so unmerchantable a quality as not to be worth at least the duty of excise chargeable or sworn, or stated in the notice of shipping the goods, to have been paid thereon, if sold for home consumption (2). If, upon the examination of the goods by an excise officer, they are found to vary from the description in the notice, as if too large an excise drawback has been claimed, or the king has been in any respect defrauded, the goods are forfeited and liable to be seized, and the person who entered them for exportation, knowing thereof, is also to forfeit for each offence treble the value of the goods, or £100 for each package, at the election of the commissioners of excise, to be signified in the information filed for the recovery of the penalty (3). In every case where a notice is given of shipping any goods for exportation on drawback, it is lawful for an officer of excise to open any of the packages mentioned in the notice, and unpack and examine the contents thereof, and the exporter shall, on the request of the officer, repack the goods, unless he choose to receive them back unpacked in the presence of the officer of excise, in order that they may be secured and sealed as by law is required for goods packed for exportation on drawback, he being afterwards allowed and paid by the com-

(1) 56 G. 3. c. 104. s. 25. Pope, tit. 10, rule 44.

(2) 57 G. 3. c. 87. s. 10.

(3) 56 G. 3. c. 104. s. 26. Pope, tit. 10. rule 45. Vide Wilson Sutton, 2 Anstr. 444.

missioners of excise any reasonable expences of such repacking, and shall either forthwith ship the same, under the before-mentioned notice, or give a fresh notice for that purpose, as the occasion may require (1). Where notice has been given for shipping any goods for exportation, upon drawback, if any other goods are shipped in the place of those of which notice has been given, or if any of those goods are relanded in Great Britain (except in a case of shipwreck or other unavoidable accident), without payment of the duties imposed on the importation of goods of the like kind, all such goods, with the packages containing the same, and the vessel from which they may be unshipped, are forfeited, and the offender also incurs a forfeiture of £200, or treble the value of the goods, at the election of his majesty's attorney general or the person suing; and such penalty is to be in addition to the penalty of the bond given on the shipment of any of such goods for exportation, and over and above all other forfeitures and penalties (2). The conditions annexed to the allowance of drawbacks have two principal objects; viz. first to prevent a drawback from being given when no duty has been already paid on the goods; and secondly, to prevent the goods from being relanded after a drawback has been allowed on their being shipped for exportation.

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Drawbacks.

Goods on which a *drawback or bounty* is payable, can only be put on board by persons licensed for that purpose. No goods entitled to either drawback, bounty, or premium, can be carried or put on board a vessel for exportation to foreign parts by any person whatever, (except the proper officers of the revenue,) but by such persons as shall be authorized for that purpose by licence under the hands of the commissioners of the customs, who are to require such security as they may deem necessary, by bond or otherwise, to be given by the persons to whom they shall grant such licence, for the actual delivery of the whole of the goods on board such vessel to the officers of the revenue stationed on board, and for the faithful and incorrupt dealing in every respect of such persons in regard to the goods. The persons licensed, upon carrying the goods on board, must give clear and full information thereof in writing to the master of the vessel, for better enabling the master to give the notice required by the act of parliament (3) before he clears out with drawback or bounty

Licence to Shippers.

(1) 57 G. 3. c. 87. s. 11. tit. 10. rule 48.
(2) 57 G. 3. c. 87. s. 12. Pope, (3) 26 G. 3. c. 40. s. 20.

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goods. The licence when granted by the commissioners of customs, cannot be withdrawn by them or the operation of it in any manner obstructed, unless either the persons to whom such licence has been granted, or some other person employed by them, and with their privity or consent, shall commit some act against any law to secure the revenue of customs or excise, and shall be convicted thereof, in which case the commissioners are to withdraw the licence (1). The commissioners of customs are to grant such licence to every person who is by law entitled to carry or put on board such goods, and who shall give such security as the commissioners shall deem necessary, and to no other person. (2)

Relanding.

It would of course defeat the object of allowing drawbacks and bounties, if goods on which a bounty or drawback has been given could be landed again in Great Britain, instead of being really exported to some foreign country. It is said that some drawbacks, particularly those upon tobacco, have been abused in this manner, and have given occasion to many frauds, equally hurtful to the revenue and to the fair trader (3). Accordingly many provisions have been made with a view to secure the exportation of the goods. No entry can pass, nor any debenture be made out upon the exportation of goods (4) entitled either to *drawback or bounty* upon exportation, but in the name of the *real owners* of the goods, if any of them are resident in Great Britain; and before such owners receive the drawback or bounty, or any allowance to which the goods may be entitled, one or more of them, (and not any broker or agent on their behalf,) must verify, by oath upon the debenture, their being the real owners of the goods, and also that the goods are really and bonâ fide exported to foreign parts, and have not been relanded in Great Britain: provided that such real owners, if they have not purchased or obtained a right to or property in the drawback to which the goods are entitled, shall at the time they are entered for exportation, acknowledge in writing under their hands upon the entry, the persons who are entitled to such drawback, and such persons, after the requisites of the act of parliament are fully complied

Oath of Ownership and against Relanding.

(1) 26 G. 3. c. 40. s. 20.

(2) 26 G. 3. c. 40. s. 21. Pope, tit. 10. rule 62.

(3) Smith W. of N. b. 4, c. 5.

(4) By 27 G. 3. c. 31. s. 24. none of these regulations are to extend to the exportation of beer; but beer is to be exported according to the laws which were in force before the passing of the act.

Encouragements of Exportation.

Drawbacks.

with, may receive such drawback, and their receipt upon the debenture shall be a discharge, (1). And the agent of a corporation or company, trading by a joint stock, is allowed to make oath in the manner allowed by law, to entitle the corporation or company to obtain a drawback. And any proprietors of lands in any of his Majesty's plantations, or any person whatever, is allowed to export any goods from any place other than that at which they reside, if such persons reside at a greater distance than 20 miles from such place; and any persons whatever are also allowed to export from any place other than that at which they reside, any goods whatsoever of British manufacture, being the property of such persons, by and in the name of an agent; and such agent is authorized to do every thing to entitle the real proprietors of the goods to every bounty, drawback or allowance due by law upon the exportation of such goods, and to recover the same, in as full and ample a manner as if the real proprietors were to act therein. Provided such agent shall testify on oath on the back of the debenture, besides what is already by law required to be testified on oath before the collector or controller or other chief officer of the customs, the names of the real proprietors of goods and their known place of abode, and shall, if required by the collector or controller, or other chief officer, give good and sufficient reason for his knowledge of the place to which the goods are intended to be exported (2). The statute 8 Ann. c. 13. (3) provides that in case foreign goods contained in any certificate, whereupon a drawback is to be made, or whereupon any debenture is to be made out for such drawback, shall not be really and bona fide shipped and exported (the danger of the seas and enemies excepted), or shall be landed again in any part of Great Britain, unless in case of distress to save the goods from perishing, which shall be presently made known to the persons in the management of the customs, or the principal officers of the port, then not only all such certificate goods shall be forfeited, but also all the persons (being the exporters or any others) who shall bring back or cause to be relanded such cer-

Relanding Drawback Goods.

(1) See Cook v. Attorney General, Parker 266. Com. Dig. Trade, C. 4. ante.

(2) 26 G. 3. c. 40. s. 18. Pope, tit. 10. r. 52. By 27 G. 3. c. 81. s. 25. in all cases where any goods intended to be exported upon drawback or bounty are subject to any duty of excise, the oaths required by the 26 G. 3. on the exportation thereof are to be taken before the excise officer; and see Postlethwaite's Dictionary, tit. Debenture.

(3) 8 Ann. c. 13. s. 16. See 43 G. 3. c. 132. s. 27.; and see s. 17. of 8 Ann. as to officers conniving.

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tificate goods, or any of them, in any part of Great Britain, or be assisting or otherwise concerned in unshipping the same, or to whose hands the same shall knowingly come after the unshipping thereof, or by whose privity, knowledge or direction the goods or any part thereof shall be relanded, shall forfeit double the amount of the drawback for such goods, together with the vessel and boats, and all the horses and carriages made use of in conveying the same, to be recovered at any time within five years after the commission of the offence. (1)

Landing Drawback Goods in Plantations.

A heavy penalty is incurred by landing goods in the plantations, when they have been entered for other places, in order to obtain a drawback. The statute 4 Geo. 3. c. 15. s. 16. enacts, that if any person shall enter goods for exportation to parts beyond the seas, other than to the British plantations in America, in order to obtain any drawback not allowed by that act upon the exportation of such goods to the plantations, and the goods shall nevertheless be carried to any British plantation in America, and landed there, the drawback shall be forfeited, and the exporter as well as the master of the vessel shall forfeit double the amount of the drawback and treble the value of the goods. (2)

Certificate of Landing at Guernsey, &c.

It is enacted by the stat. 26 Geo. 3. c. 40. that no bounty or premium shall be paid upon any goods exported from this kingdom to Ireland (3); and no drawback, bounty or premium shall be paid upon any goods whatever exported from this kingdom to the islands of Guernsey or Jersey, nor any debenture be made out for such drawback, bounty, or premium, until a certificate shall be produced under the hands and seals of the collector, controller, and surveyor of customs, or any two of them, belonging to such port in Ireland, or from the register of certificates or other chief officer of customs in the said islands of Guernsey or Jersey, as such goods shall have been respectively landed at, certifying that the goods have been duly landed there. (4)

Bounty and Drawback, Time when payable, and Decisions.

Doubts have existed as to the time when the right to a bounty on exportation is vested in the exporter. The statute

(1) As to a mere intention to reland being a violation of this law, see Wilson v. Saunders, 1 Bos. & Pul. 267. and Forrest's Rep. 35. and ante.

(2) 4 G. 3. c. 15. s. 16. Pope, title 10. rule 48.

(3) By the act of union, 39 & 40 G. 3. c. 67. bounties on Irish goods are to cease.

(4) 26 G. 3. c. 40. s. 19. Pope, tit. 10. rule 53.

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53 Geo. 3. c. 105., which was passed to remedy these doubts, enacts, that such right shall be deemed to attach as soon as *any goods shall be shipped* on board the vessel in which such goods shall be laden for exportation, and shall be afterwards duly exported (1). When on the exportation of corn a notice was given to the officer of the customs that the exporter intended to ship 1100 quarters of British wheat, by virtue of the statute 31 Geo. 3. c. 30., and one bushel was immediately put on board; but the remainder of the quantity on which the bounty was claimed, which amounted to 989 quarters, instead of 1100 quarters, as specified in the notice, was not put on board till ten days afterwards; it was held in the court of exchequer that the whole quantity put on board within the ten days was entitled to the bounty, it having been found by the jury that the shipment of the one bushel was a bona fide beginning to ship the corn with intent to load the rest at a subsequent time (2). When a drawback is payable on exportation, it appears that the master of the vessel cannot entitle himself to the drawback without producing the clearing note, which is the last document that he receives; and on an exportation from London it is not given to the master till after he has delivered all necessary papers at Gravesend: so that an exportation from London is not complete until the ship has cleared at Gravesend (3): and when a licence was granted by the crown for exporting a cargo on any day before the 10th September, and the ship cleared at the custom-house in London on the 9th, but was delayed in the river

(1) 53 G. 3. c. 105. s. 8. The section proceeds, "and no claim for bounty on printed calicoes shall be valid, unless such printed calicoes were shipped on board some vessel for exportation on or before 5th of July 1812, and were afterwards exported in the same vessel; see also as to sugar, 32 G. 3. c. 43. s. 2. and 58 G. 3. c. 34. s. 2.; and see the King v. Cookson, 16 East, 376 and 379. Ex parte Wilson, 1 Anstr. 269. 2 Anstr. 444.

(2) Wilson v. Sutton, 2 Anstruther's Rep. 444. This decision took place under the statute 31 G. 3. c. 30., and see s. 10 of the act, which allowed corn begun to be shipped outwards, or such part as should be shipped *within* 20 *days* from the entry, to be exported, though the prices should in the meantime rise to the rates at which exportation was by that act prohibited.

(3) Williams v. Marshall, 6 Taunt. 390. In 2 Marsh. 92. S. C. it was proved by an officer of the customhouse called a searcher, that it was his business to go on board at Gravesend, and deliver the cockets and clearing note; that until those documents were delivered, the merchant could not obtain the drawback to which he might be entitled; and that he would not be entitled to the drawback if the ship were lost before she arrived at Gravesend. See Postlethwaite's Dict. tit. Debenture.

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by the breaking of a bowsprit, and did not receive her clearing note at Gravesend until the 12th; it was held that no exportation had taken place on the 10th; that the voyage therefore was not protected by the licence, and was illegal, as the ship was going to a hostile port (1). So it has been determined by the court of exchequer, that although a cargo has been shipped, and the vessel entered at the custom-house, and the cargo duly entered and cleared for exportation, yet unless the vessel has proceeded out of the limits of the port, no exportation has taken place so as to protect the cargo from duties afterwards imposed on the exportation of goods of the same nature (2). The conveyance of goods from one port in Great Britain to another, or from England to Scotland, is not an exportation of them so as to found a claim to any bounty or drawback, unless there be a special provision to that effect (3). And though when it is made out to the satisfaction of the commissioners of excise that exciseable goods on which a bounty or drawback of *excise* is given by law, have been lost in the voyage, on their fair and regular export from Great Britain for Ireland, Guernsey, or Jersey, &c., a debenture may be obtained for such drawback or bounty for the goods (4); yet where sugar had been shipped for exportation, and was burnt on board the vessel at her moorings in the river Thames, the lords of the treasury refused to allow the bounties which would have become due on complete exportation. (5)

Mode of proceeding for the Drawback.

The manner of proceeding at the custom-house, in order to obtain the drawback on the export of foreign goods, usually is to obtain a certificate of the payment of the duties inwards from the collector and comptroller, and proof is to be made that the goods to be exported are those mentioned in the certificate, by the oaths of the exporter, and the merchants through whose hands they have passed. The exporter then enters the goods outwards, as in the common way of exportation. The cocket granted upon this occasion is called a certificate cocket, and differs a little in form from common over-seacockets. Notice

(1) Williams v. Marshall, 6 Taunt. 390. 2 Marsh. Rep. 92. 7 Taunt. 468.

(2) The Attorney General v. Pougett, 2 Price 381. Williams v. Marshall, 7 Taunt. 468.

(3) Scotland v. Wilson, 5 Taunt. 533. 1 Marsh. 204, 5. S. C. The King v. Orpheur, Parker 269.

(4) 41 G. 3. U. K. c. 91. Pope, tit. 11. rule 6.

(5) Pope, tit. 11. rule 6. note (a), see Williams v. Marshall, 2 Marsh. 95, 6. 6 Taunt. 393. S. C.

of the time of shipping is to be given to the searcher who attends the shipping, examines and ascertains the quantity, and returns the cocket endorsed to the officers who granted it; all other proceedings at clearing the vessel are the same as in ordinary cases. Some time after the departure of the vessel, the merchant exporter may apply to the collector and comptroller for the drawback, who will thereupon make out a debenture on a proper stamp, containing a distinct and clear narrative of the whole proceeding, with the merchant's oath that the goods are really and truly exported to parts beyond the seas, and not relanded nor intended to be relanded or brought on shore again, and also the searcher's certificates of the quality and quantity of the goods at the time of shipping underwritten. The debenture being thus duly made out and sworn to, the branches of duty to be repaid are endorsed, the merchant's receipt taken below, and the money due paid. (1)

Encouragements of Exportation.

Bounties and Drawbacks.

Before we dismiss this subject, it will be necessary briefly to enquire into the remedies to be resorted to when a drawback or bounty is withheld from those entitled to it. The court of King's Bench, in a late case, allowed a writ of mandamus to be issued, to compel a collector of excise to administer the necessary oaths, and to pay over a drawback on goods exported (2). But where a quantity of malt which had paid the duty had been burned, and the officer of excise refused to grant a certificate in order that the duty might be returned, the court of King's Bench refused to issue a mandamus, on the application of the insurance company, on the ground that the case was properly cognizable in the court of Exchequer (3). The court of Exchequer afterwards granted an order to compel the officer to perform his duty, but it appears to have been obtained by consent (3); and that court has refused to make an order to compel the officers of the customs to grant a debenture on the exportation of wheat, on an affidavit that the wheat was laden on board the vessel at a time when no bounty could be claimed, but that before the vessel sailed the price was lowered so as to entitle the exporter to a bounty; the court said that it was a question of general importance, whether an exportation had taken place so as to entitle the exporter to the bounty claimed; and that such a case

Remedy for Bounty or Drawback.

(1) See the forms of this Debenture, &c. post, appendix.

(2) The King v. Cookson, 16 East, 376. ante, 601, 602, 603. on 38 Geo. 3. c. 54. s. 4. on drawback on beer. The case was decided on the merits.

(3) Case of Calvert's malt. 1 Anstr. 269, 270.

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was not to be decided on a summary application; that the claimant might sue the officer; or that he might apply to the treasury and justice would be done (1). The searcher, or other proper officer of the customs, seems therefore to be liable to an action if he refuse to give his certificate to enable the exporter of goods to receive a bounty to which he may be entitled (2). The commissioners of excise seem also liable to an action for refusing to pay a drawback out of funds in their possession, as directed by act of parliament (3). An action, however, cannot be maintain-

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(1) Ex parte Wilson, 2 Anstr. 269. per Thomson Baron. There is this difference between a motion like the present and a mandamus, the mandamus compels the officer to make return, and the point appears on the record; the motion is only determined by the strength of the affidavits.

(2) Wilson v. Sutton, 2 Anstr. 444. see also Stephani v. Burrow, 2 Anstr. 346. an action against under-searcher of customs for refusing to sign a debenture to entitle to drawback on Peruvian bark: verdict for the defendant on the merits.

(3) Whitmore and others v. Papillon and others, 24. Mr. Justice Ashhurst's Paper Book, MSS. 84. Case reserved for opinion of the court on trial before Buller, J. The declaration stated, that plaintiffs were dealers in foreign wines within the limits of the chief office of excise, and defendants commissioners of excise; that after passing of 27 G. 3. c. 31. plaintiffs had certain wines in their stock as dealers within limits of chief office of excise, and which wines had been imported, and all the duties paid and proved to be paid; that before the committing of the grievance complained of, the plaintiffs applied to defendants, so being commissioners, for the allowances by the act granted, by a petition in writing, stating the amount of the allowances claimed, and the sorts and quantities of wine, and from whom same was received, and that the same was the sole and entire property of palintiffs, to which said petition was annexed an affidavit, made by one of the plaintiffs before two of the defendants, being two commissioners, verifying the particulars; and at the time of making claim plaintiffs produced to defendant, so being commissioners, a certificate, under the hand of the proper officer of the customs, certifying the duty paid, made out in such form as usual to obtain the drawback on wines shipped for exportation according to the statute: and defendants, so being commissioners were satisfied that the duties had been paid; and by reason of the premises, and by force of the statute, defendants, so being commissioners, ought to have paid, and became liable to pay, out of the monies in hand arising from duties of excise on foreign wine by a certain act, the sum of £— being the allowances upon the excess of said foreign wines of plaintiff, after deducting —— gallons, at the times and in the manner directed by the act, the defendants having monies, &c.; yet defendants, so being commissioners, not regarding the stat. nor their duty, have not paid, &c. See 27 G. 3. c. 31. s. 1, 2, 3, 4, 5, &c. Defendants pleaded Not Guilty, and paid money into court, (so in the paper book). Wood for defendants; and court being clearly of opinion that plaintiffs were entitled to the drawback, judgment was given for plaintiffs. See as to drawback on foreign wines 26 G. 3. c. 59. s. 46—49.

ed against a revenue officer to recover money wrongfully paid to him, after he has paid it over to his superior. (1)

Encouragements of Exportation.

The facilities to British Commerce by Commercial Treaties.

The encouragement afforded to exportation by the stipulations in *treaties of commerce* between this country and foreign states, is the next division of the subject which we proposed to consider (2). The discussion entered into in a former chapter, on the nature and effect of commercial treaties, as they were established on the principles of the law of nations, and as they affected the commerce of the world at large, renders it unnecessary that we should consider them in this place, any further than as they operate on the trade and commercial policy of Great Britain in particular. (3)

Independently of peculiar motives, not to be adopted as the basis of a general line of conduct, it is extremely questionable whether it is politic or useful to encourage a trade with a particular country, in exclusion of other nations. The general objection to commercial restraint, that capital is forced into channels in which it would not otherwise flow, seems equally to apply to a restraint introduced through the medium of a commercial treaty with a foreign potentate. The adventitious succour afforded by the favoured nation may be withdrawn by the breaking out of a war, or by other incidental circumstances, and then much greater confusion would be introduced than if we had allowed trade to find its level, had dealt equally with all the world, and had bought our goods where the best and cheapest were to be found. The individual trader, whose place of business is deserted by the public, and whose gains are derived from the friendship or caprice of one or two customers, would find it much more to his permanent, though not perhaps his immediate interest, to offer his goods on such terms as are likely to attract a more extended notice. The advantages, if any present advantages accrue, are but precarious, and are not likely to counterbalance the general mischief. Whereas, when no such encouragement is offered, the merchant is left to pursue that branch of trade which is most beneficial to himself; he knows and finds the most profitable market; and as the indivi-

(1) See Whitbread v. Brooksbank, Cowp. 69., more fully and differently reported in Loft, 532. 534. S. C. Greenway v. Hurd, 4 T. R. 553. Campbell v. Hall. Cowp. 204.

(2) See divisions of the subject, ante, 515.

(3) Ante, 38 to 47. 106, 107.

Encouragements of British Commerce by Treaties. (1)

dual gains, it is most probable that the state will gain also; for the state is made up and composed of individuals. The treaties of peace lately concluded between this country and the continental powers, therefore on this principle provide for a general reciprocity of the benefits resulting from a *free* commerce between the respective states. (1)

Treaties with France.

The definitive treaty of peace between this country and *France* contains an article declaring the desire of the two powers to establish the most friendly relations between their respective subjects; and they promise to come to a mutual understanding and arrangement as soon as possible upon their commercial interests, with the view of promoting the prosperity of both nations (2). The convention afterwards concluded between the two powers, contains a stipulation on the part of France to farm to the British government in INDIA (3), the exclusive right to purchase the salt manufactured in the French possessions on the coasts of Coromandel and Orixa, subject to certain reservations and conditions. A right is reserved to the French government to be supplied with opium at each of the periodical sales of that article, in any quantity not exceeding 300 chests per annum, on making a requisition to the governor general at Calcutta. Should any restriction be imposed on the exportation of saltpetre, the king of France is to be allowed at all events to export that article to the extent of 18,000 maunds. His Majesty has engaged to allow the French to continue in India so long as they demean themselves peaceably and act according to law (4). An act of parliament has been lately passed to impose

(1) Smith W. of N. vol. 4. 161. 168, 169, Buchanan's ed. and Mr. Pitt's speech, id. ibid.; and see the several treaties, Hawkesbury's collection of treaties, Chalmers treaties, treaties with continental powers, Pope on Customs, and post Appendix.

(2) Definitive treaty between France and England, signed at Paris, 30th May 1814, confirmed in general by treaty 20th November 1815. Pope, 69., and Appendix. Mr. Pitt's treaty in 1786 was framed to abolish the restraint that formerly shackled the commerce between the two nations, and to establish a free trade. 4 Smith, ed. 1817. 161. Appendix 38. The wines of France imported directly from France into Great Britain, according to that treaty, were to pay no higher duties than the wines of Portugal then paid, art. 6. See ante 74, 75. The older treaties will be found in Hawkesbury's collection of treaties, and Chalmer's Treaties.

(3) It will be observed that these provisions relate more peculiarly to the East Indies than to Great Britain, but it was thought advisable to mention them here, in order to give an idea of the tenor of the treaties. See also the treaties more fully stated in the Appendix.

(4) Convention between Great

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a tonnage duty on French packets or passage vessels that frequent the ports of Great Britain, in consequence of a similar duty being levied on British vessels of the same description when they enter or leave the ports of France. Every packet or passage vessel belonging to the subjects of the king of France, which shall lade or unlade goods, or take in or set on shore any passengers, in a port of Great Britain, is now subject to a tonnage duty at the rate of three shillings and sixpence for every ton of the ship's burthen; and the tonnage is to be ascertained by admeasurement by the proper officer of the customs (1). The attorney and solicitor general have, however, given it as their opinion that the act does not extend to all vessels in general, but only to such as are used as packets or passage vessels for the conveyance of letters or mails, or passengers and their baggage, or for the conveyance of goods or baggage, and not to such as are really trading vessels bringing cargoes. (2)

Treaties with Spain.

The treaty of peace between Great Britain and *Spain* provides, that the two powers shall proceed without delay to a definitive arrangement of the affairs of trade between their respective subjects (3). Great Britain is, at present, admitted to trade with Spain on the same conditions as existed previously to 1796. The treaties of commerce which subsisted at that period between the two nations, have been ratified and confirmed by the late treaty (4). The king of Spain has issued a decree, dated the 20th March 1818, for establishing the ports of Cadiz, Alicant, Corunna, and Santander, as ports of deposit for all goods which are allowed to be imported into Spain. The motive for this measure, as set forth in the decree, is a desire to give encouragement to commerce, by allowing the delay of a year in the pay-

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Britain and France, signed at London 7th March 1815; another treaty was signed at Paris 20th November 1815. The 11th article declares, that the treaty of Paris of the 30th May 1814, and the final act of the congress of Vienna of 9th June 1815, are confirmed, and shall be maintained in all such of their enactments as are not modified by that treaty. See Appendix, and Pope, tit. 69.

(1) 56 Geo. 3. c. 9. Packets detained until paid, s. 2.; no entry till duty paid, s. 4.; packets of other foreign countries may be fined by the King, s. 6.; pleasure boats or vessels excepted, s. 8. Pope, 69.

(2) 56 G. 3. c. 9. Pope, tit. 69. Letter from the Treasury, 26th December 1817.

(3) Treaty between Great Britain and Spain, signed at Madrid, 5th July 1814, art. 3. Pope, 70.

(4) Additional articles to the treaty between Great Britain and Spain, signed at Madrid, 28th August 1814. Pope, 70.

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ment of duties, and to facilitate the obtaining of supplies at all times for the markets of America (1). Articles imported into Spain for America in register ships, are likewise to be allowed to be deposited; the duty to be paid is two per cent. on the value of the goods, one-half to be paid upon the entry of them, and the other half upon their being taken away from the magazines. After the expiration of a year, an application must be made to the Minister of Finance for permission to renew the deposit. The goods are to be sealed on entering the magazines, with the seal of the owner, and of the magazines. The packages are not to be opened, but only weighed; if the goods which they contain should be found, upon a sale taking place, to be of a different nature from what was specified when they were received, they are to be confiscated; and if they should be deposited at a price inferior to their value, a fine of 20 per cent. is to be levied upon them. A statement of the goods in deposit is to be published every month by the consulados of the ports. (2)

Treaties with Portugal.

The treaty between Great Britain and *Portugal*, signed at Vienna, on the 22d January 1815, annuls the treaty of alliance concluded by the same powers at Rio de Janeiro in 1810, as being founded on circumstances of a temporary nature (3); but it is expressly agreed, that the new treaty shall not prejudice the

(1) See as to our own warehousing system, ante, 546.

(2) Letter from Sir H. Wellesley, the Ambassador at Madrid, to Lord Castlereagh, dated 27th April 1818. But an order of the general board of revenue in Spain, dated 8th May 1818, states, that the King has ordered the depôts of merchandize not to be permitted till further communications are received, which will be issued immediately. The preparations are made in every port that the royal decree of March 1818 may take effect in all the designated ports at the same time. Pope, tit. 70.

(3) The only provision of the treaty of the 19th February 1810, which is now in force with regard to the commerce of the two states, seems to be that which stipulates for the general alliance and friendship between the two crowns, and renews all treaties then subsisting "so far as the points of alliance and friendship are concerned." 2 Smith, b. 4. c. 5. The treaty is in 1 Hawkesbury's Treaties, 353. But see afterwards as to the wines of France, French treaty of 1786, 4 Smith, appen. ed. 1817, p. 43. The duties and drawbacks are now the following: French wine imported in a British-built ship is liable to a duty of 66l. 3s. the ton of 252 gallons, if ship not British-built, 70 l. 7s.; the drawback in both cases is 59 l. 17s.; Portugal wine in a British-built ship pays 43 l. 1s. the ton of 252 gallons, if ship not British-built, 46l. 4s.; which are consequently less than two-thirds of the French duties; drawback in both cases 38 l. 17s. Pope, 246. 59 G. 3. c. 52. See Observations on the Treaty with Portugal, Tucker on Trade, 35, 36

ancient treaties of alliance, friendship and guarantee, which have so long subsisted between the two crowns. A celebrated treaty was concluded, in the year 1703, by Sir P. Methuen, between this country and Portugal, by which the king of Portugal stipulated to admit the importation of the woollen cloths, and the rest of the woollen manufactures of the British, into Portugal for ever, on the same terms as before they had been prohibited, on condition that Great Britain should admit the wines of Portugal into Britain, and that no more duty should be laid on such wines, whether imported into Great Britain in pipes or hogsheads or other casks, than what should be demanded for the same quantity of French wine, deducting a third part of the duty; if the deduction should not be made, it was declared lawful for the king of Portugal to prohibit the woollen cloths, and the rest of the British woollen manufactures. The crown of Portugal therefore became bound to admit the English woollens on the same footing as before the prohibition, that is, not to raise the duties which had been paid before that time; but it does not become bound to admit them on any better terms than those of any other nation; whereas the wines of Portugal were to be admitted into Great Britain on paying only two-thirds of the duty which is paid for those of France. So far the treaty has been censured as unequal, as being evidently advantageous to Portugal and disadvantageous to Great Britain. (1)

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The treaty between England and Russia provides that the relations of amity and commerce between the two countries shall be re-established on each side on the footing of the most favoured nations (2). The contracting parties have reserved to themselves to establish a proper understanding and adjustment, as soon as possible, with respect to all matters which may concern their eventual interests, political as well as commercial. (3)

Treaties with Russia.

The commerce between this country and *Sweden* is re-established by a late treaty, on the same terms as were subsisting on the 1st of January 1791; and all treaties and conventions between the two crowns which were in force at that time, have been renewed and confirmed. (4)

Treaties with Sweden.

(1) 2 Smith W. of N. 338 to 341. ed. 1817. Tucker on Trade, 356.

(2) Treaty with Russia, done at Orelro, 6th July 1812, art 2. Pope, 60.

(3) Id. art. 4.

(4) Treaty done at Orebro between Sweden and Great Britain, 18th July 1812. Pope, 63.

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Treaties with Denmark, Austria, and Prussia.

A similar treaty has been made with *Denmark* (1). The commercial relations between the British and Danish crowns are to return to the same order as existed before the war began (1). It is also agreed to adopt measures as soon as possible, to give greater force and extent to the existing stipulations (1). *Austria* and *Prussia* are also on terms of close alliance and friendship with Great Britain. (2)

Treaties with the Netherlands.

His Majesty has also guaranteed to the Prince of the *Netherlands*, the same privileges and protection, with respect to commerce and the security of property and personal rights within the limits of the British sovereignty on the continent of India, as are conceded to the most favoured nations. (3)

Treaties with Sicily.

A treaty has been also concluded between his Majesty and the king of the Two *Sicilies*, which extinguishes some privileges that Great Britain formerly enjoyed in those dominions, but continues to place the commerce between the two countries in the most favourable light (4). His Britannic Majesty consents that all the privileges and exemptions which his subjects have enjoyed, with regard to their commerce and shipping in the Sicilian dominions, in virtue of the treaty of peace and commerce concluded at Madrid, the 10th (23d according to the different style) of May 1667, between Great Britain and Spain; of the treaties of commerce between the same powers signed at Utrecht, the 9th of December 1713, and at Madrid, the 13th of December 1715; and of the convention concluded at Utrecht, the 25th February 1712, (8th March 1813) between Great Britain and the kingdom of Sicily (5), shall be abolished; and the privileges and exemptions, whether of persons or of flag and shipping, lately enjoyed by the former country, are to be put an end to, as the treaty expresses it, for ever (5). His Sicilian Majesty has, however, engaged not to allow such privileges as those abolished to exist in favour of the subjects of any other power (6); and has promised not to annul the privileges that exist in favour of British com-

(1) Treaty signed at Kiel, 14th January 1814. Pope, 65. art. 1 & 7.

(2) Treaties 20th November 1815. Pope, 66.

(3) Treaty between Great Britain and the United Netherlands, signed at London, 13th August 1814.

(4) Treaty of Commerce and Navigation between his Britannic Majesty and the king of the Two Sicilies, signed at London September 26, 1816. Pope, 76.

(5) Art. 1.

(6) Art. 2.

merce, till the privileges and exemptions of all other nations shall cease within his dominions (1). The king of Sicily has also agreed to make a reduction, after the abolition of the privileges enjoyed by Great Britain, of 10 per cent. upon the amount of the duties payable, according to the tariff in force on the 1st January 1816, upon the total of the merchandize or productions of Great Britain and its dependencies, imported into the states of his Sicilian Majesty; it being however understood, that Sicily is allowed, if she think proper, to grant the same reduction of duty to other foreign nations (2). He has also promised, that British subjects shall not be subjected within his dominions to a more rigorous system of examination and search by the officers of customs, than that to which his own subjects are liable (3). The king of Sicily has also engaged that British commerce in general, and the British subjects who carry it on, shall be treated throughout his dominions upon the same footing as the most favoured nations, not only with respect to the persons and property of the British subjects, but also with regard to every species of article in which they may traffic, and the taxes or other charges payable on those articles, or on the shipping in which the importation is made (4). With respect to the personal privileges to be enjoyed by British subjects in the kingdom of the Two Sicilies, his Sicilian Majesty has engaged that they shall have a free right to travel and reside in his dominions, subject to the same precautions of police as are practised towards the most favoured nations. They are entitled to occupy dwellings and warehouses, and to dispose of their personal property of every kind, by sale, gift, exchange, or will, and in any other way, without the smallest loss or hindrance. They are not obliged to pay, on any pretence whatever, other taxes or rates than those paid by the most favoured nations in the dominions of the Sicilian monarch. They are exempted from all military service, whether by land or sea; their dwellings, warehouses, and every thing belonging to them for objects of commerce or residence, are treated with respect. They are not subject to any vexatious search or visits. No arbitrary examination or inspection of their books, papers, or accounts can take place under the pretence of the supreme authority of the state,

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Duties.

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(1) Art. 6.

(2) Art. 7. A separate article declares that the concession of 10 per cent. is to be understood as follows: if the amount of the duty should be 20 per cent. on the value of the merchandize, the effect of the reduction is to reduce the duty from 20 to 18, and so for other cases; and if the articles are not taxed ad valorem in the tariff, there shall be a deduction of a tenth part on the amount of the sum payable. Pope, 76.

(3) Art. 3.

(4) Art. 4.

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but is to be carried into execution by the legal sentence of the competent tribunals. His Sicilian Majesty has engaged to guarantee on all these occasions to the British subjects who reside in his dominions, the preservation of their property and personal security, in the same manner as those are guaranteed to his subjects and to all foreigners belonging to the most favoured and most highly privileged nations (1). The subjects of the *Ionian Islands*, in consequence of their being under the immediate protection of Great Britain, enjoy all the advantages which are granted to the commerce and to the subjects of Great Britain, by the Sicilian treaty (2). The commerce between the United Ionian States and the dominions of Russia, Austria and Prussia, is placed, by treaties between Great Britain and these respective powers, on the same footing, and enjoys the same advantages and facilities as the trade of Great Britain with the Ionian states. (3)

Ionian Islands.

Treaties with America.

The "convention of commerce" between Great Britain and the United States of America, provides for a reciprocal liberty of trade, between the territories of his Majesty in *Europe* and the territories of the United States (4). The inhabitants of the two countries have liberty to come freely and securely with their ships and cargoes to all such places, ports, and rivers in the territories as foreigners are permitted to come to; to enter and to reside in any parts of the territories; to hire and occupy houses and warehouses for the purposes of their commerce; in short, the merchants and traders of each nation enjoy the most complete protection and security for their commerce, and are only to be subject to the laws and statutes of the two countries (5). The same duties are imposed on the importation of articles, the produce or manufacture of the United States, into his Majesty's dominions in Europe; and the same duties are imposed on the importation of British goods into the United States as are payable on the goods of other foreign countries of the same nature;

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(1) Art. 5.

(2) Art. 8. But to prevent abuses, every Ionian vessel is to be furnished with a patent, signed by the high commissioner, or his representative. Pope, 76. and treaties respecting the Ionian islands, infra, and Pope, tit. 77.

(3) Treaties between Great Britain and Russia; Great Britain and Austria; and Great Britain and Prussia, respecting the Ionian islands, signed respectively at Paris 5th November 1815.

(4) Convention of Commerce between Great Britain and the United States, signed at London 3d July 1815; and see Convention between Great Britain and the United States, signed at London, 20th October 1818. Pope, title 136.

(5) Art. 1.

nor are any other duties imposed in either of the two countries on the exportation of articles to the British dominions in Europe or to the United States, than such as are payable on the exportation of the like articles to any foreign country; nor is any prohibition imposed on the exportation or importation of any articles of the produce or manufacture of the United States, or his Majesty's territories in Europe, to or from his Majesty's European territories, or to or from the United States, that does not equally extend to all other nations (1). The convention also declares that no duties or charges shall be imposed in any of the ports of the United States on British vessels, which are not payable in the same ports by vessels of the United States; nor in the ports of any of the king's territories in Europe on the vessels of the United States, which are not payable in the same ports on British vessels. The same duties are to be paid on the importation of British goods into the United States whether it takes place in an American or British vessel; and the same duties are to be paid on the importation of American goods into the British dominions, whether it takes place in a British vessel or a vessel of the United States. Great Britain has consented that the duties shall be the same, and that the same bounties shall be allowed on the exportation of British goods to the United States, whether it takes place in an American or a British vessel; and America has agreed that the same duties shall be paid, and the same bounties allowed on the exportation of the produce of the United States to his Majesty's dominions in Europe, whether it takes place in British or in American vessels (2). It is further agreed by the late treaty, that in all cases where drawbacks may be allowed on the re-exportation of goods, the produce of either country, the amount of the drawbacks shall be the same, whether the goods have been imported in a British or American vessel; but when the re-exportation takes place from the United States in a British vessel, or from the British territories in Europe in an American vessel, to any other foreign nation besides Great Britain or America, the two contracting powers have reserved to themselves respectively the right of regulating or diminishing the amount of the drawback. (3)

Encouragement of British Commerce by Treaties.

With respect to the intercourse between the United States and his Majesty's possessions in the West Indies and on the continent of North America, it is stipulated that each of the two

British West Indies and America.

(1) Art. 2.
(2) Art. 2.
(3) Art. 2.

Encouragements of British Commerce by Treaties.

British East Indies and America. (2)

countries shall remain in complete possession of its rights, unaffected by the late convention (1). Great Britain has agreed that the vessels of the United States of America shall be admitted and hospitably received at the principal settlements of the British dominions in the East Indies, viz. Calcutta, Madras, Bombay, and the Prince of Wales's Island, and that the citizens of the United States may freely carry on trade between (2) those settlements and the United States in all articles, the importation and exportation of which is not entirely prohibited (2); provided that it shall not be lawful for them, at a time when the British government is at war, to export military stores, naval stores, or rice, without the special permission of the British government. The citizens of the United States are to pay for their vessels when admitted, the same duties and charges as are payable on the vessels of the most favoured European nations, and they are to pay the same duties or charges on the importation or exportation of the cargoes of those vessels as are payable on the same articles when imported or exported in the vessels of the most favoured European nations. But it is expressly agreed that the vessels of the United States shall not carry any articles from the principal settlements in the East Indies to any place except to the United States, where they are to be unladen (3). It is also understood that this permission is not to extend to allow the vessels of the United States to carry on any part of the coasting trade of the said British territories; but the vessels of the United States that have in the first instance proceeded to one of the said principal settlements of the British dominions in the East Indies, and are then going with their original cargoes, or some part thereof, from one of the principal settlements to another, are not to be deemed coasting vessels (4).

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(1) Art. 2. See some observations on the old treaty, with regard to these isles. 1 Bos. & Pul. 437, &c.

(2) Wilson v. Marryatt, 8 T. R. 31. 37, &c. 1 Bos. & Pul. 430. 37 G. 3. c. 97. See infra as to the construction of this article.

(3) Bird v. Appleton, 8 T. R. 562. and infra.

(4) The same clause occurred in the old American treaty, 8 T. R. 36. notes. The words original cargo were said to furnish an inference that the trade from the United States to the British Settlements in the East Indies, must be direct and not circuitous. But the term original cargo is plainly used in opposition to the cargo taken in India. The provision respecting it is, that though the coasting trade is not permitted to the citizens of the United States, they may carry the cargo which they originally brought with them into the ports of the British territories from one port of delivery to another for the purpose of a market. The word "original"

Encouragements of British Commerce by Treaties.

The vessels of the United States may also touch for refreshment, but not for commerce, in the course of their voyage to or from the British territories in India, or to or from the dominions of the Emperor of China, at the Cape of Good Hope, the island of St. Helena (1), or such other places as may be in the possession of Great Britain in the African or West Indian Seas; it being understood that the citizens of the United States shall be subject in all respects to the laws and regulations of the British government from time to time established (2). It is also stipulated that it shall be free for each of the two contracting parties respectively, to appoint consuls for the protection of trade, to reside in the dominions and territories of the other party; but before any consul acts as such, he is to be approved and admitted in the usual form by the government to which he is sent; and it is also provided, that in case of illegal and improper conduct towards the laws or government of the country to which he is sent, such consul may either be punished according to law, if the laws will reach the case, or be sent back, the offended government assigning his reasons. (3)

On a perusal, therefore, of the several treaties now subsisting between Great Britain and foreign countries, it will be seen that commerce is in general placed on a footing of equality throughout the world. Trade is not shackled with restrictions. It is by a general intercommunity of commercial privileges, by a removal of any jealous restrictions in favour of particular countries, that the most advantageous distribution is made of the general wealth (4).

Treaty binding on British Subjects.

When a treaty has been made, the subjects of the contracting powers are bound to obey it, and cannot refuse compliance with its

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serves the purpose for which it is introduced perfectly well, and it marks a total indifference to the question where the cargo was picked up. Per. Eyre, C. J. Marryat v. Wilson, 1 Bos. and Pul. 436, 437.

(1) St. Helena has been lately assigned as the residence of Buonaparte, and all vessels interdicted but those of the East India company, so that this provision has become impossible. Declaration annexed to the treaty of 24th November 1815. Pope, 136.

(2) Art. 3.

(3) Art. 4. The fishery at Newfoundland, &c. is regulated by a convention of 20th October 1818, ratified by the President of the United States 30th January 1819. Pope, 136.

(4) See for the principles on which treaties should be framed, ante, 28, 40. 4 Smith, W. of N. 161. 168. ed. 1817.

Encouragements of British Commerce by Treaties.

provisions on grounds of expediency, or for any other reason. Sir William Scott expressly declares, that every treaty is a part of the private law of each of the countries which are parties to it, and is as binding on the subjects as any part of their municipal laws (1). The ordinance of a particular state is not indeed of sufficient force to alter the general law of nations; but a treaty between two countries supersedes the law of nations between the contracting powers, so far as the treaty extends; or rather it is the law with regard to them, for conventio vincit legem et consuetudinem (2). The proposition, therefore, to be found in works of great repute in the profession, and which is supposed to be countenanced by a determination that took place before Lord Mansfield,—that a contract may be lawfully made to insure the performance of a voyage which violates the provisions of a British treaty (3),—seems incapable of being supported, for if, as is certainly the case, the infraction of a treaty is a ground of confiscation in the admiralty court, which proceeds upon the principles of the law of nations (4); and if, as is equally true, the law of nations is recognized and adopted by the law of England, how can it be said that a trade carried on in violation of the provisions of a treaty is not prohibited at common law (5)? And a contract made to insure the carrying on of such a trade is equally illegal: when, therefore, it had been provided by an article in the treaty with America, that the vessels of the United States, should not carry the goods exported by them from the East Indies to any place but to America, and an American ship having obtained a licence from the governor in council, carried a cargo from Bombay to Canton, instead of to America, it was held that the voyage was illegal and the licence void; and a policy of insurance, made to protect the vessel at and from Canton to Europe, was held illegal, on account of the illegality

(1) The Eenrom, 2 Rob. Adm. Rep. 6, 7. 1 Marsh. Ins. 61. note. Ante 40. 46, & 47. n. 2.

(2) Pollard v. Bell, 8 T. R. 434. cited Bird v. Appleton, id. 566, 567. Christie v. Secretan, 8 T. R. 196—198.

(3) Lever v. Helcher, Park. Ins. 360. cited Marsh. Ins. 61. But the decision principally took place on the ground that it was not forbidden by the law of this country to violate the private revenue laws of a foreign country; and in Bird v. Appleton, 8 T. R. 569, 570. it seems to have been admitted, that if the voyage insured had been contrary to the American treaty, it would have been illegal; id. 196—198.

(4) 8 T. R. 567. 570, &c. Christie v. Secretan, 8 T. R. 196. &c.

(5) See also Bird v. Appleton, 8 T. R. 569, 570. and infra, and ante 47. n. 2.

of the trade in which the vessel was engaged during her stay at Canton (1). But it was determined, that a policy on goods "at and from Canton to Europe" was not illegal on account of the vessel having traded from Bombay to Canton in violation of the treaty, although the goods taken on board at Canton had been purchased with the proceeds of the cargo taken in at Bombay, and although, in trading from Bombay to Canton, the vessel had committed an act for which she was liable to be seized; because the adventure from Canton to Europe was a new adventure, and the voyage entirely distinct from that in which the illegality had been committed. (2)

Encouragements of British Commerce by Treaties.

It was observed by Eyre C.J. in the case Marryat v. Wilson (3), that the privileges conferred by a treaty are not to be narrowed in a court of justice, to the disadvantage of the state on which we have conferred them, by a forced and rigorous construction. The courts of justice in this country will not suppose that any indirect advantage was intended to be derived by subtle modes of argument, that do not accord with the general tenor of the treaty, as chicanery is unworthy of the British government, and contrary to the character of its negociations, which have been at all times distinguished for their good faith, even to a degree of candour which has been sometimes imagined to expose it to the artifices of more refined politicians. The nature of the trade granted, or the privilege conferred, is a good rule for fixing the construction of the grant. It is proper also to deduce arguments from the context, and from contrasting the doubtful part of the treaty with the other stipulations. And the intention and spirit of the treaty are to be attended to (4).

Construction of Treaties.

The old treaty with America, recognized and confirmed by the statute 37 Geo. 3. contained a provision similar to that existing at the present day, which allowed the citizens of the United States freely to carry on trade between the British dominions and the United States (5). The true meaning of this article

(1) Bird v. Appleton, 8 T. R. 562. The treaty was recognized, and the necessary enforcement given to it by the legislature, 37 Geo. 3. c. 97.

(2) Bird v. Appleton, 8 T. R. 562.

(3) 1 Bos. & Pul. 436.

(4) See the observations of Eyre, C. J. 1 Bos. & Pul. 436—439. and see ante 44. as to the construction of treaties.

(5) 37 G. 3. c. 97 & 117. 8 T. R 35. 1 Bos. & Pul. 436.

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was at one time contended to be, that the intercourse must be immediate and direct between America and the East Indies: but as an American might have come from America to any country in Europe and bought goods and carried them back to America, and from thence to the East Indies, so there seems to be no reason why he should not be allowed to do the same thing directly as he might do indirectly; and after full consideration, it was determined that a different construction is to be put on the treaty, and that the trade between America and the British settlements in the East Indies, may be carried on circuitously through any country in Europe inclusively of Great Britain. Lord Chief Justice Eyre made the following observations when the case was removed by writ of error to the court of exchequer chamber: "The language of the 13th article is, that the citizens "of the United States may freely carry on a trade between the "said territories and the said United States, in articles not en-"tirely prohibited. They are therefore not restricted to trade "in articles of the growth, produce, and manufacture of the "United States: it is enough that the articles they trade in are "not articles prohibited from being imported to the British ter-"ritories in India, or exported from thence by any body. If, "then, they propose to trade with the British territories in India "in foreign commodities, as they may do, they must use means "to furnish themselves with those commodities. In the nature "of things it must be done in a course of trade. The obvious "course of trade is, that they should carry their native commodi-"ties to other countries, where they can be exchanged with the "most advantage for articles proper for the East India market; "and that they should then proceed to India in order to carry "on a trade there in those articles. I find nothing in the treaty "which will warrant me in saying that it was the intention of the "contracting parties that the trade conceded by the treaty "should not be so carried on. The counsel for the defendant "found himself obliged to acknowledge that the citizens of the "United States might, within the terms of this treaty, first "import into America the articles in which they propose to "trade with the British territories in India, and then export "them from America in a direct voyage to the East Indies, and "he could not deny that they might have imported these articles "into America even from London. Indeed it would have been "a most extraordinary state of things if they might have gone

" to every other market for the goods they wanted, but that the British market was excluded; and as to the apparent disadvantage under which the citizens of the United States would carry on trade with the British territories in India so conducted, it was argued that so to understand the treaty would be only to give the fair and due preference to the great national commerce of the East India company. Whether this trade should have been conceded under any qualifications or restrictions is one thing; it having been conceded, now to attempt to cramp it by a narrow rigorous forced construction of the words of treaty, is another and a very different consideration. The nature of the trade granted, in my opinion, fixes the construction of the grant. If it were necessary to go further, strong arguments may be drawn from the context of this article, and the contrast which the comparing it with the preceding article will produce. From the context it appears that the trade was to be *free*, subject only to certain specific regulations. There may be reason to apprehend that this treaty will open a door to many of our own people, whom the policy of our laws has excluded from a direct trade to the East Indies. I conclude that this circumstance was foreseen, and that the balance of advantage and disadvantage was found to preponderate in favour of the treaty. The circumstance that this part of the cargo of the Argonaut was procured here, and the share which the plaintiff Wilson, a British agent, had in procuring it, might have deserved consideration, as evidence of collusion, by means of which Wilson was carrying on for himself an illicit trade to the East Indies, which might have subjected this ship and cargo, or this part of the cargo, to seizure and confiscation. But this use has not been made of the facts found by the special verdict, and no other use consistent with our opinion of the legal effect of the treaty could be made of them. For a citizen of the United States being allowed to trade to the British territories in India generally, with the exception of the trade in a few articles only, as he may take in his cargo in the ports of his own country, so he may take it in in the ports of this country as well as any other; and he may employ an agent, and that agent may be a British subject. It seems to me impossible to maintain in argument, that the subject of a nation in amity, who may trade to the British territories in India, should be excluded from one market for his outward

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"investment, when all other markets are open to him, and "when it is distinctly admitted that the markets of all the "world, including ours circuitously, must be open to him (1)." A natural-born subject of Great Britain is entitled to the privileges conferred by treaty on the subjects of a foreign country, if he is domiciled and has become a citizen in that country. (2)

(1) Marryatt v. Wilson, 1 Bos. & Pul. 430. 8 T. R. 31. S. C.

(2) Marryatt v. Wilson, 1 Bos. & Pul. 430. 8 T. R. 31.; and see Bell & Reid, 1 M. & S. 726.

CHAP. XII.

Of the Colonial Trade and Laws affecting it, and the Foreign Commercial Companies (1).

THE remaining encouragement afforded to the commerce of Great Britain is derived from her colonies and settlements abroad. The beneficial effects of the colonial trade principally consists in opening an extensive market for such parts of the natural produce of the united kingdom and of her manufactures as may exceed the demand of the markets nearer home, those of Europe and of the countries that lie round the Mediterranean Sea, and in furnishing to the mother-country the peculiar commodities of the colonial regions (2). Without subtracting from the home markets any part of the produce that has been usually sent to them, it encourages Great Britain to increase the surplus, by continually presenting new equivalents to be exchanged for it. It tends to increase the quantity of productive labour in the mother-country, without altering the direction of that which had been employed there before (3). The learned author of the Treatise on the Wealth of Nations, who endeavours to prove that exclusion of other nations from the colonial trade, is injurious to the wealth of the parent state, feels himself obliged to admit that the advantages of the colonial trade of Great Britain more than counterbalance the bad effects of the monopoly. He observes, that this branch of trade, as it is carried on at present, is greatly advantageous. The new market and the new employ-

(1) See in general Smith's W. of N. b. 4. c. 7. Brougham's Inquiry into Colonial Policy of European Powers, 803. vol. 1. & 11. passim. Paley's Mor. Phil. vol. 1. page 387. Edwards West Indies, vol. 2. Robertson's History of America, vol. 3. Tucker on Trade, 40, 41. Stoke's Laws of the Colonies, per. tot. and the respective Laws of the several islands and plantations, printed in folio and quarto; and Montesquieu Esp. L. b. 21. c. 17.; and Rees Cyclopedia, tit. Colony, per. tot. and titles Charter, Governments. Bridgeman's Index, title Colonies.

(2) Per Sir W. Scott in case of Immanuel, 2 Robinson's Rep. 197. Montesquieu, Esp. L. b. 21. c. 17., and see ante 211.

(3) As to the advantages and disadvantages incident to the establishment of colonies, see the works above referred to, and Rees Cyclopedia tit. Colony. Tucker on Trade.

ment which are opened by the colonial trade, are of much greater extent than that portion of the old market and of the old employment which he conceived was lost by the monopoly. The new produce and the new capital which have been created by the colonial trade, maintain in Great Britain a greater quantity of productive labour than what could have been thrown out of employment by the revulsion of capital from other trades. And it is rather for the manufactured than for the rude produce of Europe that a new market is opened by the colonial trade. (1)

Some nations have given up the whole commerce of their colonies to an exclusive company, of whom the colonies were obliged to buy all such European goods as they wanted, and to whom they were obliged to sell the whole of their own surplus produce. It was the interest of the company, therefore, not only to sell the former as dearly and to buy the latter as cheaply as possible, but to buy no more of the latter, even at this low price, than what they could dispose of for a very high price in Europe. It is their interest not only to lower, in all cases, the value of the surplus produce of the colony, but in many cases to discourage and keep down the natural increase of its quantity (2). But although these mischievous consequences are likely to result from exclusive companies, occasions may exist in which the institution of an exclusive company will be justifiable and proper. As an inducement to men of speculative and enterprising minds to embark their capital in a difficult branch of trade, it is sometimes just that they should be allowed to remain for a time in exclusive enjoyment of the profits, in return for the labour and expence originally bestowed. When, for instance, an undertaking is of such magnitude as to deter private persons and voluntary associations from entering upon it; when large sums must be expended before the project can be brought to bear, and the trade to answer; it is but reasonable that those who adventure in a joint stock should be incorporated, and have the privilege of excluding all others from interfering in the new branch of commerce till the adventurers are sufficiently paid for the risks they have incurred and the expences to which they have been put. An eminent author is of opinion, that the establishment of exclusive companies may be justified on this ground; for, as he observes, it is better to have the trade of an exclusive company than no trade at all: and in process of

(1) Smith's W. of N. b. 4. c. 7. (2) Smith's W. of N. b. 4. c. 7.

time, as the reasons for continuing the company will cease, the trade should be laid open (1). On the same principle it has been decided, that where a place for trade is discovered with the great peril of any persons, the king by his prerogative may grant them the sole trade there. (2)

The subject proposed to be considered in this chapter will be arranged in the following order; first, we shall consider what country is to be deemed a colony or plantation; secondly, what laws are in force in the colonies, how justice is administered, and what tribunals are to be resorted to to obtain redress for wrongs committed there; thirdly, of the East India Company; fourthly, the West India Trade; fifthly, the Hudson's Bay Company; sixthly, the South Sea Company; seventhly, the African Company; eighthly, the Sierra Leone Company; ninethly, the Russia Company; tenthly, the Eastland Company; eleventhly, the Turkey Company; and twelfthly, the Greenland Fisheries.

1st, What Country is a Colony or Plantation of Great Britain. (3)

The settlements and colonies of Great Britain in Asia, Africa, and America are designated by different terms in different provisions of the acts of navigation and other statutes. In the act 12 Car. 2. c. 18. s. 1. they are spoken of as "*lands*, islands, plantations, or territories;" in section 18. of the same statute, the goods enumerated are not to be carried but to some other English "plantation." In statute 13 & 14 Car. 2. c. 11. s. 6. ships are required to be built in the king's "*dominions*" in Asia, Africa, or America, and persons of the king's "plantations" are declared to be English within the meaning of the act of navigation. The statute 7 & 8 W. 3. c. 22., which is stated in the title to have been passed to regulate the plantation trade, generally uses the terms colonies and plantations, and sometimes plantation only. The act recites that the governors of the colonies or plantations were by statute 12 Car. 2. c. 18. obliged to take a certain oath, whereas in the act they are called the governors of the lands, islands, plantations, or territories, without any mention of colonies. Mr. Reeves expressed an opinion that the legislature used the word "plantations" in a different

(1) Dean Tucker's Essay on Trade, 67 to 71., but see id. 40, 41. See also as to exclusive companies, 2 Smith W. of N. b. 4. c. 7. 379, &c. where they are in general reprobated.

(2) 1 Rol. Rep. 5. Com. Dig. Trade, D. 1.

(3) See Division, supra; and see ante, 212.; and Definition in Stoke's Laws of Colonies, page 1.

1st, What a Colony or Plantation.

sense from that which they intended should be annexed to the general words "the lands, islands, and territories of his majesty" in Asia, Africa, and America, as they used the term plantation only in the 18th section of the 12 Car. 2. c. 18., and omitted the words lands, islands, and territories, although they had been made use of in other parts of the act (1). This distinction, however, can only be applied in practice if it should happen that the king possesses lands and territories in Asia, Africa, and America, which are not plantations. The trade to such dominions as do not come under that denomination would be exempted from certain restrictions by the adoption of this rule. As for instance, the statute 7 & 8 W. 3. c. 22., which requires the trade to the colonies or plantations to be carried on in British-built ships, would not affect those lands or territories which could not in construction of law be deemed colonies or plantations, all which might still be traded to by ships British-owned, by virtue of the first clause of the act of navigation (2). The British settlements in the East Indies in the possession of the East India Company have been held to be "colonies or plantations," at least within the meaning of the navigation laws, so that a ship built in Surat has been considered entitled to a plantation register (3). So when a Danish ship bound on a voyage from Bengal to Copenhagen, took in her loading at Calcutta, the trade was held illegal on account of the statute 12 Car. 2. c. 18. s. 1. (4), which was regarded as prohibiting such a traffic with the East Indies in any other than a British vessel (5). A voyage in a *Swedish* ship from *Madras* to Gottenburgh has been also held to be prohibited by the navigation act (6). The statute 37 Geo. 3. c. 117. was passed on account of the East Indies being comprehended within the expressions in the navigation act, to relieve foreigners, who might trade to that part of the world (7), from the necessity of exporting in British vessels. But, in practice, the provisions in the navigation laws had been in some measure relaxed with respect to the East Indies (8); and a late statute, to which we have alluded on a

(1) Reeve's Hist. Ship. 135.

(2) 12 Car. 2. c. 18. s. 1. Reeve's Hist. Ship. 136. Sed quere as to this distinction.

(3) 7 & 8 W. 3. c. 22. Reeves, 128.

(4) See also 7 & 8 W. 3. c. 22. s. 2.

(5) Mork v. Abel, 3 Bos. & Pul. 35. vide Reeves, 1st ed. 134.

(6) Chalmers v. Bell, 3 Bos. & Pul. 604. 12 Car. 2. c. 18. s. 1. 7 & 8 W. 3. c. 22. s. 2. vide Reeves, 1st ed. 134.

(7) 33 G. 3. c. 52. s. 139.

(8) Chalmers v. Bell, 3 Bos. & Pul. 606.

former occasion (1), recites that the navigation acts have not been applied in practice to the trade with the East Indies when carried on by his majesty's subjects. The statute proceeds to enact, that the navigation laws shall not extend to the trade carried on by his majesty's subjects in British vessels within the limits of the East India Company (2). It seems, therefore, to have been considered, that the East Indian possessions are comprehended within the denomination of colonies and plantations, or at least within the larger expression of lands, islands, plantations, and territories, as used in the acts of navigation. 1st, What a Colony or Plantation.

No distinction appears to exist between the two terms colony and plantation. Mr. Reeves observes, that the word plantation first came into use. It implied the idea of introducing, instituting, and establishing where every thing was desert before, as the plantation of Ulster, of Virginia, of Maryland, and other places. The word colony, which is derived from the Latin *colonia* (in which language it signifies simply a plantation), is said not to have come much into use till the reign of Charles 2d, and denoted the political relation in which the plantations stood towards this kingdom. In different parts of New England (for instance) voluntary societies had been formed among persons who had left the mother country on account of restraints imposed upon them in matters of religion, without the direction or participation of the English government; so that in the time of Charles the 2d, there were not wanting persons who pretended to doubt of their constitutional dependence on the crown of England; and it was recommended, in order to put an end to such doubts, that the king should appoint governors, and so make them colonies (3). A colony, therefore, might be considered as a plantation that had a governor and civil establishment subordinate to the mother country. All the plantations in America, except those of New England, had such an establishment, and they were, according to this idea, colonies as well as plantations. In the statute 7 & 8 W. 3. c. 22. and the navigation acts made afterwards, the two terms are used without distinction (4.) Newfoundland is considered as a colony or plantation, as in reason it ought to be: for although it has lately been regarded only as a fishery, and the policy of the government has

(1) Ante, 212.
(2) 57 Geo. 3. c. 95.
(3) Reeves Hist. Ship. 138. Smith, W. of N. b. 4. c. 7. vol. 2. 359. 411.
(4) Id. ibid. 15 Car. 2. c. 7. &c. 12 Car. 2. c. 18.

1st, What a Colony or Plantation.

been to prevent planting and colonization there, yet the original design was to plant that island as well as Virginia, or any other part of America, and the original charters appear to have been granted to planters as well as to merchant adventurers. (1)

But the term plantation is only to be applied to colonies that are settled principally for the purpose o' raising produce; it has not been extended to the British dominions in Europe, neither to Dunkirk, Toulon, or Calais, while those places were in our possession, nor at the present day to Jersey or Guernsey, or the islands in the English Channel. Colonial produce cannot be lawfully transported from the British West Indies to Gibraltar, because Gibraltar is a mere fortress or garrison, and not a plantation (2). So the island of Malta is not a plantation; and therefore a contract to carry a cargo of sugar, rum, and other West India produce to Malta has been held illegal. (3)

What Colonies are in his Majesty's Possession.

A question has sometimes arisen whether a particular colony or plantation could be considered as *belonging to his majesty or in his possession.* In the treaty of peace with Spain in 1763, it was agreed by the 17th article, that the king of England should cause all the fortifications erected there by British subjects to be demolished, but on the other hand it was agreed by the king of Spain, that the British subjects and their workmen should not be disturbed or molested in their occupation of cutting logwood, for which purpose they were allowed to build and occupy houses and magazines for their families and effects. Notwithstanding these stipulations in favour of British settlers, it was considered that the Bay of Honduras was not a plantation or territory belonging to his majesty, so as to be liable to the restraints imposed by the navigation act on the trade to the colonies, but that it was a part of the Spanish territories subject to the exercise of such rights as had been agreed upon by the treaty in favour of British subjects (4). Another question arose with respect to Guadaloupe, on its being taken from the French in 1799. The

(1) 15 Car. 2. c. 7. s. 7. &c. 25 Car. 2. c. 7. Reeves Hist. Ship. 123. as to importation of fish and oil in foreign ships from Newfoundland Op. of Sir J. Hawles, 24th January 1698. Op. on 4 G. 3. c. 15. as to duty on goods from colony in America, Ante 361 to 366.

(2) Lubbock v. Potts, 7 East, 449. 3 Smith 401. S. C. Reeves Hist. Ship. 125. 1 ed See the Patapsco Acton's Rep. 305.; the Immanuel, 2 Rob. Rep. 198. 12 Car. 2. c. 18. s. 18. ante 213.

(3) Rubichon v. Humble, 1 Dow. Rep. 191. See 48 G. 3. c. 69. 41 G. 3. c. 103.

(4) Reeves, 1 ed. 126. per Mr. De Grey, 19 Nov. 1768.

1st, What a Colony or Plantation.

law officers gave it as their opinion that this island was to be considered a plantation or territory belonging to his majesty, and in his possession within the meaning of the navigation act; as, notwithstanding very advantageous terms had been granted to the inhabitants, they were disarmed and in a state of subjection to his majesty's troops. All new commissions were to be taken under his majesty, and all acts of justice were to be performed in his name. He was in actual possession of all the public revenues, and the trade of the island had changed its course, passing now in English bottoms only to Great Britain. On the other hand, an objection was raised to this opinion, on the ground of the condition and circumstances of the inhabitants of the island, who enjoyed privileges under the articles of capitulation hardly compatible with the state of subjects. But this objection will have no weight, if it be considered that there were personal privileges, confined only to the present inhabitants, who had been restrained from alienating to any but the king's subjects; and the capitulation was not made with the French king, but only with the inhabitants. The right of sovereignty therefore was wholly changed, and the whole island was the king's acquisition by conquest; so that Guadaloupe was held liable to be treated as a plantation or territory belonging to his majesty or in his possession within the meaning of the act of navigation, as well as of other laws relating to the duties on goods imported into this country from the colonies (1). So with respect to Newfoundland, whatever doubt might have existed as to the king's sovereignty in that island, when he had no settled governor there, and had exercised no act of dominion, all doubt must have ceased at the treaty of Utrecht, when the king of Great Britain was acknowledged to have the sovereign dominion of the island. (2)

2dly, What Laws respecting Trade are in force in the Colonies, Plantations, and Islands of Great Britain. (3)

The *legal constitution* and government of the colonies may be considered under three divisions:—1st, Whether the laws of

(1) Reeves, 130. by the Attorney General Pratt, 7 August, 1759. and Solicitor General Yorke, 13 August 1759.; who cited a similar case of St. Christopher, A. D. 1688, ceded afterwards by the Treaty of Utrecht. See also the opinion of Sir F. Norton, that the goods at Guadaloupe, when it was taken could not be carried to the West Indies, as they had not been shipped in Great Britain. 15 Car. 2. c. 7. 2 Feb. 1764.

(2) Reeves Hist. Ship. 124. See also Blackburn v. Thompson, 3 Campb. 61. 15 East, 81. S. C. Johnson v. Greaves, 2 Taunt. 344. Muller v. Thomson, 2 Campb. 610. Atkinson v. Abbott, 11 East, 135. 1 Campb. 535. The Abby, 5 Rob. Adm. Rep. 254.

(3) See division of the subject ante, 633. As to the navigation laws as they affect the colonies, ante 211 to 235.

2ndly, What Laws in force in Colonies, &c.

the parent state, or what other institutions, are in force in the colonies, together with the extent of the power of parliament and of the king to make new laws to regulate the colonies, or to alter those already established; secondly, the mode of making laws and administering justice within the colonies, which branch of the subject involves the consideration of the whole of their *interior* polity; thirdly, the mode of obtaining redress in the courts of justice of this country for crimes and civil injuries committed in the colonies, together with the operation and effect of the English laws on colonial property in cases of bankruptcy and intestacy. It would be impracticable, in a treatise of this nature, to enumerate all the local laws of each particular colony, island, or plantation: these will be found collected in separate publications of the laws of each particular colony, island, &c.

The colonies are governed by different rules in respect to their legal constitution, as they have been either settled in a place formerly unoccupied, or established in a country that has been acquired by conquest. When a colony of English subjects is settled in a country formerly uninhabited, the laws in force in England are said to be immediately in force in the new colony (1). But an act of parliament afterwards made in England will not be binding on the new colony, unless it be particularly named; and therefore the requisites of the statute of frauds in executing wills, &c. have no effect in Barbadoes (2). And Mr. Justice Blackstone observes, that the doctrine that the laws of England are in force in the newly discovered country, must be understood with many and great restrictions. The colonists, he says, can only carry with them so much of the English law as is applicable to their own situation and the condition of an infant colony; as for instance, the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people; the laws of police and revenue; the mode of maintenance for the established clergy; the jurisdiction of spiritual courts; and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted and what rejected, at what times and under what re-

(1) Blankard v. Galdy, 2 Salk. 411. 666. 4 Mod. 222. Com. Dig. Ley. C. 2 Peere Wms. 75. Shower, P. C. 32. Sprag v. Stone, Dougl. 38. Vide etiam 1 Chalm. 23. Stokes' Laws of Colonies, 10.

(2) 1 Chalm. Coll. Op. 220. 2 id. 202. 4 Mod. 225. Com. Dig. Navigation. G. 3. 2 Peere Wms. 75. 4 Bla. Com. 109. 2 Ld. Raym. 1245. 2 Salk. 411. Stokes' Law of Colonies, 30.

strictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the revision and control of the king in council; the whole of their constitution being also liable to be newly modelled and reformed by the general superintending power of the legislature in the mother country (1). The qualification engrafted by the learned commentator on the general doctrine must therefore be considered as implied by the writers by whom this doctrine is advanced; and the laws in force in the mother country are only binding in the new colony so far as they are applicable to its state and circumstances. English subjects carry with them the common law, which becomes the law of the plantations in which they settle; and all statutes in affirmance of the common law antecedently to the settlement of a colony, are in force in that colony. But it is not true as a general proposition, that the inhabitants of the colonies carry with them the statute laws of the realm; but whether they do so or not depends upon circumstances, on the effect of their charter, on usage, and the acts of their legislature; and it would be both inconvenient and dangerous to adopt the proposition in so large an extent (2). By the local acts of some of the plantations, as in the Leeward Caribbee Islands, it is expressly declared, that the common law of England, as far as it stands unaltered by any written laws of those islands, or by act of parliament of England, shall be in force in the islands; and that all customs and usages to the contrary shall be void (3). But by referring to the different collections of local statutes passed in most of the West India islands, and other plantations, it will be found that in general they contain express enactments applicable to each plantation or colony.

2ndly, What Laws in force in Colonies, &c.

If a new territory be obtained by conquest, the old laws and customs by which the people have been governed are binding, provided they are not contrary to the law of God, until new laws are imposed by the conqueror; as it would be extremely inconvenient that the old laws should be abrogated before new ones have been devised for the government of the people (4). But in conquered or ceded countries, the king of England has a legis-

(1) 1 Bla. Com. 108. Stokes' Law of Colonies, 4, &c.

(2) 1 Chalm. 195. 198. 232.

(3) See Collection of Laws of St. Christopher and Leeward islands, Act. 10. 31. page 18. Stokes' Law of Colonies, 30.

(4) Blankard v. Galdy, 4 Mod. 225. 2 Salk. 411. Com. Dig. Ley. C. Hall v. Campbell, Cowp. 209 Collet v. Lord Keith, 2 East, 260.

(5) Calvin's Case, 7 Rep. 17 b. Campbell v. Hall, Cowp. 209, 211.

2ndly, What Laws in force in Colonies.

lative authority, and may alter their former laws if he think fit, without the consent of parliament (5). Our American plantations, says Mr. Justice Blackstone, are principally within the rules laid down with respect to the government of conquered or ceded countries, having been obtained either by right of conquest and the extermination of the natives, or by treaties. And therefore the common law of England, as such, has no authority there, they being no part of the mother country, but distinct though dependent dominions. However, the crown has from time to time established the common law of England in all the British American plantations, except Quebec or Canada (1). These plantations are also subject to the control of parliament, though, like Ireland and the Isle of Man, they are not bound by any acts of parliament, unless particularly named (2). The king, says Lord Mansfield, has power, without the concurrence of parliament, to alter the old and introduce new laws in a conquered country: his power of legislation being, nevertheless, subordinate to the authority of parliament, he can not make any new change contrary to fundamental principles; he cannot exempt an inhabitant from the particular dominion, as for instance, from the laws of trade or from the power of parliament, or give him privileges exclusive of his other subjects; and so in many other instances which might be put. A country conquered by the British arms becomes a dominion of the king in the right of his crown, and is therefore necessarily subject to the legislature—the parliament of Great Britain. The articles of capitulation upon which the country is surrendered, or the articles of peace by which it is ceded, are sacred and inviolable, according to their true intent and meaning. It is left by the constitution to the king's authority to grant or refuse a capitulation; if he refuses, and puts the inhabitants to the sword, or exterminates them, all the lands belong to him. But if, as is more usual in modern times, the king receives the inhabitants under his protection, and grants them their property, he has power to fix such terms and conditions as he thinks proper. He is intrusted with making the treaty of peace;—he may yield up the conquest, or retain it, upon what terms he pleases. These powers, says Lord Mansfield, no man ever disputed; neither has it hitherto been controverted, that the king might change part

2 Peere Wms. 75. Show. Parl. Cas. 31. Wytham v. Dutton, 3 Mod. 159—161.

(1) Stoke's Law of Col. 30. and see as to Quebec and Canada, 14 G. 3. c. 83. and 88.

(2) 1 Bla. Com 109, and 2 Peere Wms. 75. Spragge v. Stone, cited by Dunning, Dougl. 38. 25 G. 2 c. 6. s. 10. 4 Inst. 284.

or the whole of the law or political form of government of a conquered dominion. (1)

2ndly, What Laws in force in Colonies.

But although the king has an original and inherent right of legislation over a conquered or ceded country, he cannot exercise that power if he has previously established a different constitution, by which the newly acquired country is to be governed; as was determined with respect to the island of Grenada. On the capitulation of that island it was agreed by the articles of capitulation that it should be governed by the existing laws until his majesty's pleasure should be known, and that the inhabitants of the island should enjoy their property and privileges as fully as the other subjects of his majesty in the British Leward Islands. A treaty of peace was afterwards signed, by which Grenada was ceded to Great Britain. The treaty was made on the 10th February 1763; and in the next year, a proclamation issued under the great seal, by which it was declared that the king had commissioned his governor, as soon as the state and circumstances of the colony would admit, to call an assembly to enact laws. Another proclamation was issued on the 26th March 1764, reciting a survey and division of the ceded islands, which his majesty had ordered to be divided into allotments, as an invitation to purchasers to come in and purchase on the terms specified in the proclamation. On the 9th April 1764, a commission actually issued, in compliance with the promise held out in the proclamation, appointing general Melville governor, with a power to summon an assembly as soon as the state and circumstances of the island would admit, and to make laws with consent of the governor and council, with reference to the manner adopted in the other assemblies in the king's provinces in America; but before the arrival of the governor at Grenada, indeed, before his departure from London, letters patent were issued under the great seal, by which an alteration was made on the duties that had been established while the island was in possession of the French, on the exportation of sugar, and the duties were made the same as those payable in the other British Leeward Islands. On the validity of these letters patent a question arose; and though the abolition of the French duties and substitution of the new tax were just and equitable with respect to Grenada itself and the other

(1) See these principles more at large in Hall v. Campbell, Cowp. 204 to 214.

2ndly, What Laws in force in Colonies.

Leeward Islands, yet through inattention, in inverting the order in which the instruments should have passed, the letters patent were contradictory to the former acts of the crown, and were therefore determined to be void. The two proclamations and the commission to governor Melville were considered as amounting to an irrevocable grant to all who might be inhabitants or might acquire property in the island of Grenada, or, more generally, to all whom it might concern, that the subordinate legislation over the island should be exercised by an assembly, with the consent of the governor and council, in like manner as the other islands belonging to the king. There was no reservation in the original proclamation of any legislative authority to be exercised by the king, or by the governor and council under his authority, till the assembly should meet; for it alluded to a government by laws in being and by courts of justice, not by a legislative authority, until an assembly should be called. After the proclamation, therefore, acts of legislation could only be performed by the assembly of the island, or by acts of the parliament of Great Britain (1). A country that comes to the crown by title or descent retains its old laws, which cannot be altered by the crown without the authority of an act of parliament. (2)

Interior Regulations of Colonies.

2ndly, We will now consider the plantations with reference to their *interior* polity. The law and legislative government of every dominion, says lord Mansfield, affect all persons and all property within its limits. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privilege as such distinct from the natives of these places (3); and on the other hand, no law made in one of the colonies, or indeed in any other state, will bind a person who is not resident within it, and has not brought himself within its jurisdiction. (4)

Considered with respect to their interior polity, our colonies are properly of three sorts (5). 1st. *Provincial establishments,* the constitutions of which depend on the respective com-

(1) Campbell v. Hall, Cowp. 204.

(2) Calvin's case, 7 Co. 17 b.

(3) Campbell v. Hall, Cowp. 204.

(4) Buchanan v. Rucker, 9 East, 192.

(5) 1 Bla. Com. 109. Montefiori's Dict. tit. Plantations. Stokes' Laws of Colonies, 13 & 14. See Rees's Cyclopedia, tit. Charter Governments.

missions issued by the crown to the governors, and the instructions which usually accompany those commissions, under the authority of which provincial assemblies are constituted, with the power of making local ordinances not repugnant to the laws of England (1). 2ndly. *Proprietory governments*, granted out by the crown to individuals in the nature of feudatory principalities, with all the inferior regalities and subordinate powers of legislaion which formerly belonged to the owners of counties palatine: yet still with these express conditions, that the ends for which the grant was made be substantially pursued, and that nothing be attempted which may derogate from the sovereignty of the mother country. 3dly. *Charter governments*, in the nature of civil corporations, with the power of making bye-laws for their own interior regulation, not contrary to the laws of England, and with such rights and authorities as are specially given them in their several charters of incorporation. The form of government in most of them, is borrowed from that of England. They have a governor named by the king, or in some proprietory colonies by the proprietor, who is his representative or deputy. They have courts of justice of their own, from whose decision an appeal lies to the king and council here in England (2). Their general assemblies, which are their house of commons, together with their council of state, being their upper house, with the concurrence of the king or his representative, make laws suited to their own emergencies (3). But it is particularly declared by the statute 7 & 8 W. 3. c. 22., that all laws, bye-laws, usages and customs, which shall be in practice in any of the plantations, repugnant to any laws therein mentioned, or to be made in this kingdom relative to the said plantations, shall be utterly void and of none effect. (4)

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An act of parliament made in this country is not binding in the plantations unless they are expressly named in the act (5), but they may, in general, be bound by laws made for them by an English parliament (6); and a statute prohibiting popery

(1) See Campbell v. Hall, Cowp. 204. as to the authority of provincial establishments to make laws, &c. see Stokes' Laws of Colonies, 14. and Rees's Cyclopedia, tit. Charter, Governments.

(2) Mostyn v. Fabrigas, Cowp. 174. Stoke's Laws of Colonies, 26. 2 Ld. Raym. 1447. Rees's Cyclopedia, tit. Charter, Governments.

(3) 1 Bla. Com. 109, 110. Montefiori, tit. Plantations.

(4) 7 & 8 W. 3. c. 22. s. 9.

(5) 4 Bla. Com. 105. ante, 638.

(6) Vaughan 400. Stokes' Laws of Colonies, 4. 28, 29.

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within the realm "or the dominions thereunto belonging," has been considered to embrace the plantations, as they are dominions belonging to the realm of England (1). But by the 18 Geo. 3. c. 12. s 1., the king and parliament of Great Britain declared, that from thenceforth they would not impose any duty, tax, &c. payable on any of the king's colonies, provinces, and plantations in North America or the West Indies, except for the regulation of commerce, the produce whereof is always to be applied to the use of the colony in which it is levied. The king, by virtue of his prerogative, may compel aliens who have not been made denizens or naturalized, to depart out of the plantations (2), a matter which is now regulated by particular statutes (3). So the king may establish a court of equity in one of the provinces of the plantations, if there be no clauses in the charter that exclude the power of the crown (4). The attorney and solicitor-general were of opinion, on a case submitted to them in the year 1738, that the crown had a power, by virtue of its prerogative, to erect a court of exchequer in South Carolina; which, they said, might be done by letters patent under the seal of the province, by virtue of his majesty's commission to the governor for that purpose. They were of opinion, that his majesty might erect a court of exchequer in South Carolina, with the same powers as the court of exchequer in this country; and they thought, the proceedings in the newly erected court, should conform, as much as possible, to our own practice. They were also of opinion, that the general power of erecting courts of justice, which had been conferred on the governor by his commission, was sufficient to authorize him in appointing a chief baron, but as, by the 39th instruction, the crown seemed to reserve to itself the consideration, whether a

(1) By Northey Attorney General, October 18, 1705. 1 Chalmer, 2. on statute 11 W. 3.; but when statute 27 Eliz. 2. c. 2. made it high treason for any priest born within the realm, or other dominions of his Majesty, to come into the realm, &c. it was doubted whether the act extended to plantations acquired after the act was made. See also Opinions of Attorney and Solicitor General De Grey and Willes, 1767. Colonies embraced by the words "or any other of her Majesty's dominions." 1 Chalm. 200. Doubted whether King's prerogative as to patents (under 21 Jac. 21. c. 3.) extends to the plantations, by Raymond and Yorke, Attorney and Solicitor General, 18th July 1720. 1 Chalm. Opin. 203.

(2) By Northey Attorney General, October 18, 1705. 1 Chalm. 4. ante 143. and 12 Car. 2. c. 18. s. 2. ante 148.

(3) Ante, 152 & 148.

(4) By Sir E. Northey Attorney General, 1 Chalm. 183. 21st April 1703. Massachuset's Bay.

standing court of exchequer should be erected or not, and as doubts had arisen in the province respecting the authority of the existing chief baron, they conceived it was not advisable to rest the authority of erecting the court and appointing the chief baron on the present commission andinstructi ons, but that a special commission should be issued to the governor, authorizing the establishment of a court of exchequer, and the constitution of the chief baron and other officers (1). Sir Dudley Ryder was of opinion, on a case submitted to him respecting the establishment of a criminal court at Newfoundland, that a power to take cognizance of capital crimes could not be granted to the governor of that country by instructions only signed by his majesty in council, but that it ought to be under the great seal, and therefore, if thought advisable to be granted, ought to be inserted in the governor's commission; but he also said, that the manner of exercising such power might be prescribed and limited by instructions, for any breach of which the governor would be answerable to his majesty. He thought that neither the power of trying, nor that of pardoning treasons, was fit to be delegated to the governor, nor any court to be erected by him (2). But the stat. 10 & 11 W. 3. c. 25. s. 13., which authorized the trial of capital offences committed in Newfoundland in any county of England, did not take away or affect the king's prerogative to erect courts of justice in Newfoundland, for the trial of all sorts of crimes committed there; so that his majesty was at liberty, after the making of that act, to erect and constitute such courts there, for the trial of capital and other crimes, as he might think proper. (3)

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With respect to the general efficacy of the king's prerogatives in the colonies, it is stated, in the opinion of an eminent counsel, the nature of whose office led him to a frequent consideration of matters of plantation law, that the prerogative in the West Indies, unless where it is abridged by grants, &c. made to the inhabitants of the respective provinces, is that power over the subjects,

(1) By Sir J. Strange and Sir D. Ryder, Attorney and Solicitor General, 12th June 1738. 2 Chalm. 169.

(2) By Sir D. Ryder Attorney General, 27th March 1750. 2 Chalm. 241. See the next note.

(3) By Sir D. Ryder, 30th January 1749. 2 Chalm. 240. vide tamen, the statutes for erecting courts for administering justice in Newfoundland, 32 Geo. 3. c. 46. 33 Geo. 3. c. 76. continued by 34 Geo. 3. c. 44. and 35 Geo. 3. c. 25.

2ndly, What Laws in force in Colonies, &c.

considered either separately or collectively by their representatives, which by the common law of the land, abstracted from all acts of parliament and grants of liberties, &c. from the crown to the subjects, the king could rightfully exercise in England. (1)

Punishment of Crimes and Redress for Civil Injuries.

3dly, The common law of England, like the laws of most other countries, considers *crimes* as local in their nature, and proper to be tried in the place where the offences were committed. On account of this rule, a statute was passed in the reign of William and Mary, to enable the governors of plantations to be tried in this kingdom for crimes committed in the plantations. The statute 11 & 12 W. 3. c. 12. enacts (2), that if any governor, lieutenant governor, deputy governor, or commander in chief of any plantation or colony within his Majesty's dominions beyond the seas, shall be guilty of oppressing any of his Majesty's subjects beyond the seas within their respective governments or commands, or shall be guilty of any other crime or offence contrary to the laws of this realm, or in force within their respective governments or commands; such oppressions, crimes, and offences, shall be tried in the court of King's Bench in England, or before such commissioners and in such county of the realm as shall be assigned by his Majesty's commission; and that the same punishments shall be inflicted as are usually inflicted for offences of the like nature when committed in England. Another statute has been since passed of more extensive operation, to secure the trial and punishment of persons holding public employments who might be guilty of crimes abroad; the statute 42 G. 3. c. 85. provides, that any person holding a public station, office, or employment out of Great Britain, and guilty of an offence in the exercise of his public functions, may be tried in the King's Bench on an information exhibited by the attorney general, or an indictment found; and all persons so offending and tried under this act or the statute of W., shall receive the same punishment as is inflicted on similar offences committed in England, and are also liable, at the discretion of the court, to be adjudged incapable of serving his Majesty or holding any public employment (3). So the East India bill, 13 G. 3. c. 63. autho-

(1) 1 Chalm. Opin. 233. Opinion of Mr. West, counsel to the Board of Trade, May 27, 1719. Doubted whether prerogative as to patents under 21 Jac. 1. c. 3. extends to plantations, by Raymond and Yorke, Attorney and Solicitor General, 18th July 1720. 1 Chalm. Op. 203.

(2) See Decisions, 1 Chitty, C. L. 150, 151, 157.

(3) 42 Geo. 3. c. 85. s. 1 & 2. 8 East, 31.

rized the trial of offences committed by his Majesty's subjects in India, in the court of King's Bench (1). And the statute 24 G. 3. c. 64. contained some special provisions for the trial of British subjects holding public employments in the East Indies, who might be guilty of extortion and other misdemeanors (2). It is also proper to notice, that the trial of treason, of murder, and of manslaughter, when committed out of the realm, is provided for by the statutes 35 Hen. 8. c. 2. 33 Hen. 8. c. 23. and 43 Geo. 3. c. 113. and the statute 28 Hen. 8. c. 15. which authorised the trial of treasons, felonies, robberies, and murders (3) committed on the high seas; and it seems to have been considered that this act extends to the colonies, though they were established before the act was passed, and that a commission might issue into any county within the realm of England, to try an offender guilty of murder on the high seas, who might be brought over for that purpose, and the witnesses examined, and the jury sworn before the commissioners (3). But without the aid of an act of parliament, an indictment will not lie in the King's Bench for an offence committed in the plantations, as was expressly held by Lord Kenyon, on an indictment against a storekeeper employed by government at Antigua in the West Indies; but it was also holden, that as the fraud committed by the defendant in the West Indies had been supported by false returns made to the navy office in London, the jurisdiction of the court attached. (4)

2ndly, What Laws in force in Colonies, and Redress for Crimes and Injuries.

Trespasses and injuries to *real* property are also local according to our law, so that no action can be maintained in the courts of justice in this country for a trespass or injury committed on real property in one of the plantations where there is any court of justice (5). This technical rule had indeed been relaxed in practice by Lord Chief Justice Eyre and Lord Mansfield, in favour of places beyond the seas within the king's dominions; and in one case an action was held maintainable in this country against Captain Gambier for a trespass committed in Nova Scotia by pulling down the houses of some settlers who supplied the

(1) 13 G. 3. c. 63. s. 39.

(2) 24 G. 3. c. 25. s. 64. & seq.

(3) Opinion of King's Advocate Hay, and Attorney and Solicitor General Yorke and Norton, 1762, 1 Chalmers 199; also of opinion, that the 11 & 12 W. 3. c. 7. and 11 Geo. 1. c. 29. s. 7. did not extend to murder, but only to such felonies as were equal or inferior to the species expressed. Now all offences are included by 39 Geo. 3. c. 37.

(4) Rex v. Munton, 1 Esp. Rep. 62. 6 East, 590. S. C. before the passing of the 42 G. 3, c. 82.

(5) Doulson v. Matthew, 4 T. R, 503.

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seamen with spirituous liquors. An objection was taken to the count for pulling down the houses, and a case was cited in which an action for an injury committed to real property abroad was held not to be sustainable (1). But Lord Mansfield overruled the objection. He said that the injury was committed on the coast of Nova Scotia, where there were no regular courts of judicature; that if there had been, Captain Gambier might never go there again; and therefore the reason of the locality of such an action, when brought for an injury committed in England, could not be applied to the case before the court (2). But whatever doubts may have been formerly entertained, it seems to be now settled, that no action or suit in equity can in general be maintained in this country for an injury to real property out of the kingdom, as for instance, for entering a house in Canada. Actions which are in their nature transitory, may be tried in this country, though they arise out of a transaction that took place abroad, but not such as are in their nature local (3). So a bill for the delivery of the possession of lands in Saint Christopher cannot be supported, though it might to account for the rents thereof; for lands in the plantations are no more under the jurisdiction of the court of chancery than lands in Scotland, as that court only agit in personam (4). A contract however relating to possessions in the colonies may be enforced or executed in personam in a court of equity here (5). But where the question upon the construction of the contract for a security by way of mortgage having been before a court of competent jurisdiction in the colony, and a foreclosure and judicial sale directed, and certain allegations of fraud were merely general and denied, an injunction was refused in the court of Chancery in England on the ground of a want of jurisdiction to interfere; but it was intimated that the lords of the council might perhaps give some directions to prevent a sale until an appeal (6). It has been decided, that from a decree respecting lands in the Isle of Man or in the plantations, an appeal generally lies to the king in council, and no words in a grant can deprive a subject of his right to appeal, much less if the grant be silent (7).

(1) Skinner v. East India Company, Cowp. 167, 168.

(2) Cowper, 180, 181.

(3) Doulson v. Matthews, 4 T. R. 504. Skinner v. the East India Company, Cowp. 167. Roberdean v. Rous, 1 Atk. 543. Penn v. Lord Baltimore, 1 Ves. 444. Stokes on Law of Colonies, 9.

(4) Roberdean v. Rous, 1 Atk. 544.

(5) Penn v. Lord Baltimore, 1 Ves. 444. White v Hall, 12 Ves. J. 321. Jackson v. Petrie, 10 Ves. J. 165.

(6) White v. Hall, 12 Ves. J. 321.

(7) Christian v. Corren, 1 P. W. 329. 2 P. W. 262. Sel. Ca. Ch. 5. 9 Mod. 124.

But *personal* injuries are of a transitory nature, and sequuntur forum rei (1). Injuries to the *person* or to *personal* property are said to accompany the person against whom they are committed, and therefore an action may be maintained in a British court of justice for a trespass on a man's person or on his personal property, though it took place abroad (2). So an action was held maintainable against the governor of Minorca, for seizing an inhabitant of the island and banishing him without cause (3). But no action can be maintained against the supreme authority in a state, or those acting by virtue of such authority, for an act done *servato juris ordine*, according to the constitution of the country in which the injury complained of has been committed (4); and though the court of King's Bench in England has jurisdiction to send a habeas corpus to the plantations, where they can judge of the cause, and give relief upon it, yet the more usual course is to proceed upon affidavit, and petition for redress to the king in council. (5)

2ndly, What Laws in force in Colonies, and Redress for Crimes and Injuries.

Debts and contracts are not confined by any rule of locality, and therefore an action or suit may be maintained in our courts of justice on a contract made in the plantations, or indeed in any foreign country. But if a contract is not obligatory in the country in which it was entered into, it cannot be enforced in any part of the world. As when a contract was made in Jamaica which was void by the laws of that island, then in our possession, for want of a stamp, it was held that no action could be maintained on that contract in an English court of justice (6). So when an agreement was given in evidence that had been made in Surinam, it was held by Lord Ellenborough, that if a stamp was necessary in Surinam, to render the agreement valid, it could not be received in evidence without the stamp required by the law of that colony (7). So on the other hand our courts will give effect to contracts which are made according to the laws in force in the country where they are entered into, though differing from

Debts contracted in Colonies.

(1) Per De Grey, C. J. 2 Bla. Rep. 1058.
(2) Mostyn v. Fabrigas, Cowp. 161.
(3) Mostyn v. Fabrigas, Cowp. 161. 2 Bla. Rep. 929. S. C. 11 Harg. Stat. Tr. S. C. Cooke v. Maxwell, 2 Stark. 183. Wey v. Yally, 6 Mod. 195. Lord Bellamont's cacase, 2 Salk. 625. See 42 Geo. 3. c, 85. s. 6.
(4) Rafael v. Verelst, 2 Bla. Rep. 985. 987. Vide id. 988. 1055. Per Lord Mansfield, Mostyn v. Fabrigas, Cowp. 173, 174.
(5) In Rex v. Coule, 2 Burr. 856. Stokes Law of Colonies, 5, 6.
(6) Alves v. Hodson, 7 T. R. 241. 2 Esp. Rep. 528. Chitty on Bills, 5 ed. 74, 75.
(7) Clegg v. Levy, 3 Campbell, 167.

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our own rules of law. The assignee of a Scotch bond may maintain an action of assumpsit in the courts of this country, in his own name, although by the law of England, a chose in action cannot be assigned (1). So the assignee of an Irish judgment may sue in this country in his own name, as judgments by cognovit are assignable by the laws of Ireland (2). The statute 5 Geo. 2. c. 7. was passed to make some provisions to facilitate the recovery of debts in the British plantations in America, when a person residing in Great Britain is a party; and it made the lands, negroes, and real estates in those plantations liable to the satisfaction of pecuniary demands (3). This act provides, that in any action or suit depending in any court of law or equity in any of the plantations in America, for or relating to any debt or account, wherein any person residing in Great Britain shall be a party, it shall be lawful for the plaintiff or defendant, and any witness, to verify or prove any matter or thing by affidavit in writing, upon oath or affirmation, before any mayor or other chief magistrate of the city, borough, or town corporate in Great Britain, where or near to which the person making such affidavit or affirmation shall reside, and certified and transmitted under the common seal of such place, or the seal of office of such chief magistrate; and that such affidavit shall be received in evidence in the court in the plantations, the same as if the witness had appeared in court, provided that the addition and place of abode of the party swearing or affirming be stated in the oath. (4)

When the payment of a debt is wrongfully withholden, the rate of interest is to be calculated according to the laws of the country where the debt was contracted, and is not governed by the amount of the interest allowed in the country where the debt is sued for; but in a court of equity the debtor is allowed the rate of ex-

(1) Innes v. Dunlop, 8 T. R. 595.

(2) O'Callagan v. Marchioness of Thomond, 3 Taunt. 82.

(3) See observations on this act, Stokes Laws of Colonies, 371. Before this act if a man died seised of an estate in fee of land in the foreign plantations, the same was assets in the hands of his executor for the payment of his debts contracted in the plantations or elsewhere in relation to it. Com. Dig. Assets C. Biens A. 2. 2 Ventr. 358. 2 Ch. Ca. 145. 1 Vern. 453. 469.

(4) See forms of letters of attorney, affidavits, certificates, and other proceedings on this act, in Stokes Laws of Colonies, 374, &c. It was said in Noel v. Robinson, 1 Vern. 460. that the method of making a plantation in Barbadoes liable to a debt contracted in England, is to procure a procuration from hence under the seal of the Lord Mayor of London, or an acknowledgement by the owner upon the spot.

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change of the country where the debt was contracted (1). On a late trial, in an action on a bill of exchange, drawn in Bermuda on a person in England, and also payable in England, the plaintiff recovered $7\frac{1}{2}$ per cent. interest, being the rate of interest at Bermuda (2). A doubt was entertained whether the statute of usury, 12 Ann. st. 2. c. 16., which reduced the rate of interest to 5 per cent., did not extend to money lent on lands in Ireland or the plantations, when the mortgage was executed in Great Britain; but the statute 14 Geo. 3. c. 79. declares all such securities made previously to that act to be valid, notwithstanding the 12 Ann., where the interest is not more than the established rate of the particular place; and that all future securities of the like kind shall also be valid where the interest is not more than 6 per cent. (3), and the money lent is not known at the time to exceed the value of the property pledged. However, it has been held that the statute 14 Geo 3. is an enabling act, extending only to particular cases; and it does not extend to such bonds as are mere personal contracts, but only protects mortgages and other securities respecting lands in Ireland or the plantations (4). Where a debt was contracted in England, but the bond was taken for it in Ireland, to be paid at a certain time, and at 7 per cent.; it was held by the court of chancery that it should carry Irish interest (5): but a different doctrine was held when the bond, contract, or mortgage was executed in England, in which case only 5 per cent. interest is allowed, independently of the statute 14 Geo. 3. (6) So that it seems that only 5 per cent. interest can now be reserved on securities executed in England, and not made on property in Ireland or the plantations. In case a bond or other debt, contracted in Jamaica, be made payable in London, it has been held, that the expence of commission to the agent remitting the money falls on the debtor. (7)

An action may be maintained on the judgment of a court of justice in one of the plantations, as, indeed, it may on any foreign

(1) Ld. Dungannon v. Hackett, cited in Rane v. Nichols, 1 Eq. Abr. 289. pl. 1. 2 Bridgm. Ind. 88.

(2) Dougan v. Banks, Chitty on Bills, 5 ed. 540. In Steel v. Sowerby, 6 T. R. 171, 172. it appeared that the rate of interest at St. Christopher, was then six per cent. West India interest six per cent., Chambers v. Golden, 9 Ves. J. 267.

(3) Steel v. Sowerby, 6 T. R. 171, 2. and note.

(4) Dewar v. Span, 3 T. R. 425.

(5) Conner v. Lord Bellamont, 2 Atk. 382. Prec. Chanc. 128. 1 Peere Wms 395. 2 Atk. 465.

(6) Phipps v. Earl of Anglesea, 1 Peere Wms. 696. Stapleton v. Conway, 3 Atk. 727. 1 Ves. 427.

(7) Cash v. Phennion, 11 Ves. J. 314.

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judgment; and an action will lie on a judgment obtained in a court of equity established there, as well as on a judgment at common law (1); but an action cannot be maintained on the decree of a foreign court, by which the defendant is ordered to pay a sum of money to the plaintiff on a certain day, "first deducting thereout the defendant's costs, to be taxed by the proper officer," where the defendant's costs have not been taxed, either at his own request or on an exparte proceeding at the instance of the plaintiff (2). A judgment obtained in a court of judicature in one of the plantations is considered only as a simple contract debt, for which an action of assumpsit may be maintained; it is not conclusively binding, like a judgment in a court of record, but the grounds of it may be inquired into; and if the defendant dispute the judgment, he should not plead nul tiel record, but take issue upon it as a matter of fact, to be tried by the jury (3). If it do not appear by the proceedings that the party against whom the judgment has been obtained was at one time or other resident in the colony, or subject to the jurisdiction of the colonial court, but only that he was summoned by nailing up a copy of the declaration at the court-house door, no action can be maintained on the judgment; as it is manifestly unjust that a party should be bound by the adjudication of a court, when he never came within its jurisdiction; and though a law has been made in the colony authorising the proceeding against persons absent from the island, by nailing up the declaration at the door of the court, it will be intended that that law was meant to apply to those who had been present and subject to the jurisdiction, for it would not be binding if it was meant to affect strangers (4). But an action may be maintained on a foreign judgment obtained by default, which states that the defendant appeared by attorney, without proving that the attorney mentioned had authority to appear, or that the

(1) Sadler v. Robins, 1 Campb. 253. and see O'Callagan v. the Marchioness of Thomond, 3 Taunt. 82. 84. If it be a Jamaica judgment to ascertain the value in English money, multiply the current money by five, and then divide by seven, which produces the sum sterling. In Stenhouse v. Mitchell, 11 Ves. J. 357. a doubt is expressed whether an action lies upon a bond on which judgment has been obtained in Jamaica.

(2) Id. ibid.

(3) Walker v. Witter, Dougl. 1. Jamaica judgment; and other cases in the notes. Messin v. Lord Massareene, 4 T. R. 493.

(4) Buchanan v. Rucher, 9 East, 192. 1 Campb. 63. Cavan v. Stewart, 1 Stark. 525. Fisher v. Lane, 3 Wils. 297. 304. Tobago judgment, &c. See also Cooke v. Maxwell, 2 Stark. 183.

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defendant was living within the jurisdiction of the foreign court, for a court of justice will give credit to the judgment for facts specifically alleged (1). When an action was brought on a covenant entered into by the defendant to indemnify the plaintiff from all debts due from a partnership in which he had been engaged with the defendant, and from all suits instituted in consequence of the partnership, proof of the proceedings in a court of chancery in Grenada against the late partners, for the recovery of a partnership debt, in which a decree passed for want of an answer, and a sequestration issued against the plaintiff's estate, was held conclusive against the defendant, who was not allowed to shew that the proceedings were erroneous (2). But a foreign judgment is examinable when one of the parties is seeking to enforce it in a court of justice in this country. (3)

In an action on the judgment of a colonial court, it is in general necessary to prove the handwriting of the judge by whom it is subscribed, and the authenticity of the seal annexed. On an action being brought upon a judgment obtained in the island of Grenada, the plaintiff was nonsuited, because he could not prove that the seal affixed was the seal of the island; and on a motion to set aside the nonsuit, the court held that this rule was correct. They said, they could not take judicial notice that the seal affixed was the seal of the island, which was necessary to be shown in order to prove the judgment which it purported to authenticate; that proving the judge's handwriting could not advance the proof of the seal, unless by considering him in the nature of a witness to it, which was not pretended (4). A judgment therefore must either be authenticated, by proving the seal of the foreign court, or evidence must be given that the court has no seal, and then the judgment may be established by proving the signature of the judge (5). If there is a seal belonging to the court, it should be used for the purpose of authenticating its judgments, and should be established in evidence by a person acquainted with the impression (6). A copy of a judgment in the supreme court of Jamaica, made by the chief clerk, cannot be

(1) Molony v. Gibbons, 2 Campb. 502.

(2) Tarleton v. Tarleton, 4 M. & S. 20.

(3) Walker v. Witter, Dougl. 1. ante, 652.

(4) Henry v. Adey, 3 East, 221. Buchanan v. Rucher, 1 Campb. 63. Hiudt v. Atkins, 3 Campb. 215.

(5) Alves v. Bunbury, 4 Campb. 28.

(6) Cavan v. Stewart, 1 Stark. 525.

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received in evidence in a court of justice in this country, although it appear that such copies are usually admitted as good proof in the courts of Jamaica (1). An exemplification authenticated by the seal of the court is admissible, but not a copy made by the officer of the court. (1)

Whatever amounts to a discharge of a debt in the country where it was contracted, is a discharge of it every where (2). Therefore, when an action was brought in this country on a bill of exchange, given by the plaintiff to the defendant in a foreign state, where both parties were resident, but drawn on a person in England, and afterwards protested here for unacceptance, and the defendant, while he continued to reside abroad, became a bankrupt, and obtained his certificate by the law of that state; it was held that such certificate was a bar to an action on the bill founded on the circumstance of its not having been accepted (3). But a discharge under a commission of bankrupt in a foreign country, is no bar to an action against the bankrupt by a subject of this country for a debt arising here (4). It is true, that we so far give effect to foreign laws of bankruptcy, that assignees of bankrupts deriving title under foreign ordinances, are permitted to sue here for debts due to the bankrupts estates; but the reason of this is, that the right to personal property must be governed by the laws of the country where the owner is domiciled. (5)

When an action was brought here for a debt contracted in India, it was held sustainable though more than six years had elapsed since the making of the contract, during all which time the debtor had been resident in India; and although the supreme court at Calcutta, within the jurisdiction of which the transaction arose, was held under a charter that authorized the court to exercise the same jurisdiction in civil cases as is exercised by the court of King's Bench in England at common law (6), yet that charter did not alter the effect of the statute of limitations, as applied in the courts of justice in this country; and therefore, even assuming that the provisions of that statute were

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(1) Black v. Lord Braybrook, 2 Stark. 6.

(2) Burrows v. Jemino, 2 Stra. 733. Ballantine v. Golding, Cooke's Bankrupt Law, 347. 5 East, 130. per Lord Ellenborough.

(3) Potter v. Brown, 5 East, 124.

(4) Smith v. Buchanan, 1 East, 6.

(5) Smith v. Buchanan, 1 East, 11.

(6) The charter granted under 13 G. 3. c. 63.

transferred to India by the terms of the charter, as auxiliary to the common law; yet, according to the statute as it was in force here, it was held, that a creditor was not barred by the lapse of six years after the debt arose, as the debtor had been resident out of the realm. (1)

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The principal difficulties that have arisen to impede the proceedings of our courts of justice here, in respect of transactions in the colonies, have been attributable to the necessity of obtaining evidence from the colonies. By the practice of our courts of law, when a material witness resides abroad, or is going abroad so that he cannot attend at the trial, the party requiring his testimony may move the court in term time, or apply to a judge in vacation, for a rule or order to have him examined on interrogatories, de bene esse, before one of the judges of the court if he reside in town, or if he reside in the country or abroad, before commissioners specially appointed and approved of by both parties (2). But as the depositions of witnesses on interrogatories are considered only secondary evidence, the rule or order for their being so examined cannot be obtained without the consent of both parties; though if one of the parties should refuse his consent, the court will assist the party applying by putting off the trial until the consent is obtained, or the witness returns; and if the defendant should refuse, the court will not allow him to enter up judgment as in case of a nonsuit (3). If the court should put off the trial, the party who requires the testimony has an opportunity of filing a bill in chancery for a commission to examine the witnesses. Various statutes have been also passed prescribing methods of obtaining evidence from abroad; in particular, the statute 13 Geo. 3. c. 63. which relates to the examination of witnesses resident in India, and obtaining proofs from that quarter of the globe, when civil or criminal prosecutions are instituted in this country for matters arising in India. The statute 13 Geo. 3. c. 63. enacts, that when misdemeanors or offences committed in India are prosecuted in the court of king's bench, a mandamus may be issued on the application of the prosecutor or the defendant, requiring the chief justice and judges of the supreme court of judicature at

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(1) Williams v. Jones, 13 East, 439. 21 Jac. 1. c. 16. s. 7. 4 Ann. c. 16. s. 19.

(2) Tidd. Prac. 6 ed. 583. Peake's Ev. 65. Phil. Ev. 13.

(3) Mostyn v. Farligas, Cowp. 174. Farly v. Newnham, Doug. 419. Callinud v. Vaughan, 1 Bos. & Pul. 210. Jones v. Brewer, 4 Taunt. 46. Tidd. 863.

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Fort William, or the judges of the mayor's court at Madras, Bombay, or Bencoolen, as the case may require, to hold a court for the examination of witnesses and receiving other proofs. And after directing the mode in which the court is to be held, and the examinations taken transmitted to England and delivered into court, the statute goes on to enact, that such depositions being duly taken and returned, shall be allowed and read, and shall be deemed as good evidence as if the witnesses had been sworn and examined in court (1). If the prosecution has been instituted against the chief justice or judges of the supreme court of judicature, the mandamus is to be directed to the governor general and council at Fort William (2). When proceedings take place in parliament for offences committed in India, a warrant may be issued by the lord chancellor or speaker of the house of lords, or by the speaker of the house of commons, as the court of King's Bench may issue a mandamus; and when such a warrant has been issued, the proceedings are not discontinued by a prorogation or dissolution of the parliament (3). Also, when the East India company or any other person institutes a suit in law or equity for a civil cause arising in India, any of the courts at Westminster in which the suit is brought, may, on motion, award writs in the nature of a mandamus or commission to the chief justice and judges of the supreme court of judicature at Fort William, or to the judges of the mayor's court at Madras, Bombay, or Bencoolen, for the examination of witnesses; and such examination being duly returned, shall be allowed and read, and shall be deemed competent evidence at any trial or hearing between the parties in such cause or action (4). These writs have been accordingly issued in several causes in the court of King's Bench, as well at the suit of as against the East India company, and other parties; and in one case, the motion being made on the last day of the term, the court awarded such a writ even before issue joined (5). The statute 24 G. 3. c. 25. also contains a provision authorizing the depositions of witnesses taken in India, and transmitted to the court of King's Bench, to be read in evidence before the special commissioners appointed by that act for the trial of officers guilty of misdemeanors in the East

(1) 13 Geo. 3. c. 63. s. 40.
(2) 13 Geo. 3. c. 63. s. 41.
(3) 13 Geo. 3. c. 63. s. 42, 43.
(4) 13 Geo. 3. c. 63. s. 44.
(5) Spalding v. Muire, T. 35 G. 3. K. B. Tidd. 6 ed. 856. S. C. not S. P. 6 T. R. 363. Mulloch v. Lushington, M. 26 G. 3. K. B. East India Company v. Lord Maldon, E. 32 G. 3. Taylor v. East India Company, M. 33 G. 3. Tidd. 856.

Indies (1); and the 42 Geo. 3. c. 85. which was passed to facilitate the trial and punishment of persons holding public employments who had committed offences abroad, contains a provision, that when prosecutions are instituted by virtue of the act, it shall be lawful for the court of king's bench, on motion, and after sufficient notice has been given, either on behalf of the prosecutor or defendant, to award writs of mandamus in its discretion, to the chief justice or judge of any court of judicature in the country or island, or near to the place where the offence has been committed, or to any governor or lieutenant governor, or other person having chief authority in such country, or to any other person residing there, as the court may think expedient, for the purpose of obtaining and receiving proofs concerning the matters charged in the indictment or information; and after pointing out the mode in which a court is to be held for receiving the proofs, and the examinations taken transmitted to England and delivered into court, the statute proceeds to enact, that such depositions being duly taken and returned, shall be allowed and read, and shall be as good evidence as if the witnesses had been sworn and examined in court (2). The court of king's bench may also, on such a prosecution, order a de bene examination of witnesses on interrogatories, where the vivâ voce testimony of such witnesses cannot be conveniently had (3). But as the 42 Geo. 3. directs that the writs of mandamus shall be issued in the discretion of the court, it has been holden that a defendant indicted here for a misdemeanor committed by him in the West Indies in a public capacity, is not entitled to postpone the trial till the return of the writs of mandamus, on an affidavit in the common form for putting off a trial on account of the absence of a material witness, but he must lay before the court such special grounds by affidavit as may reasonably induce them to think that the witness sought to be examined are material to his defence (4). The prosecutor, however, is entitled to writs of mandamus for this purpose as a matter of course; and on an affidavit stating the special circumstances, writs of mandamus have been issued on the part of the defendant.

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(1) 24 Geo. 3. c. 25. s. 64 to 81. see also 26 Geo. 3. c. 57.

(2) 42 Geo. 3. c. 85. s. 2.

(3) 42 Geo. 3. c. 85. s. 3. see also s. 4 & 5.

(4) Rex v. Jones, 8 East, 31, and Picton's case, cited id. 34.

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A provision has been also made by act of parliament to facilitate the proof of the execution of writings made and attested by persons resident in the East Indies. The statute 26 Geo. 3. c. 57. enacts that whenever any bond or other deed or writing executed in the East Indies, and attested by any person or persons resident there, is offered in evidence in any court of justice in Great Britain, it shall be sufficient to prove by one or more credible witness or witnesses, that the name of the obligor or other party subscribed to such deed or writing is the proper handwriting of the obligor or other party, and that the name of the attesting witness is his handwriting, and that the witness is resident in Great Britain; and in like manner all courts of justice in the East Indies are bound to admit the same proof of the execution of bonds and other deeds and writings executed and attested in Great Britain; and such proofs shall be deemed as good evidence of the due execution of the bonds and other deeds and writings, as if the witnesses were dead (1). Since this statute was passed, it has been laid down as a general rule of evidence, not confined to the East Indies, that when the subscribing witness to a deed or any other written instrument is absent in a foreign country, and consequently is not amenable to the process of our courts of justice, it is sufficient to prove the witness's handwriting (2), although we have seen it is required by the statute, that the handwriting of the party to the instrument should be also proved; and this proof has been also required by high legal authorities, on the ground that if the attesting witness were present, he would prove not merely that the instrument was executed, but the identity of the person executing it, and the proof of the handwriting of the attesting witness, only establishes that some person executed the instrument by the name which it purports to bear, but does not go to establish the identity of that person (3). However, in a late case, where an action was brought on a promissory note, and the subscribing witness was dead, it was held sufficient to prove his handwriting, and that the defendant was present when the

(1) 26 Geo. 3. c. 57. s. 38.

(2) See Cooper v. Marsden, 1 Esp. Rep. 2. Gough v. Cecil, Selwyn's Nisi Prius, 516. note, MS. of Serjeant Hill. Adam v. Keir, 1 Bos. & Pul. 361. Currey v. Child, 3 Campb. 283. Cunliffe v. Sefton, 2 East, 183. Prince v. Blackburn, 2 East, 250. Phil. Ev. 419.

(3) Wallis v. Delancey, 7 T. R. 266 n. Nelson v. Whittal, 1 Barn. & Ald. 21. Vide Coghlan v. Williamson, Dougl. 93.

note was prepared, without proving the handwriting of the defendant. (1)

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When it becomes necessary to give in evidence the laws of one of our colonies, or of any other foreign country, in a court of justice, as for instance, in order to show that a contract made abroad was not made according to the law of the place where it was entered into, it is necessary to prove the law according to the rules of evidence. If the law was in writing, an authenticated copy of it must be produced; if not, it must be proved by the testimony of a witness acquainted with the laws of the foreign country. (2)

Writs not ministerially directed, sometimes called prerogative writs, because they are supposed to issue on the part of the king, such as writs of mandamus, prohibition, habeas corpus, and certiorari, may issue on a proper case to every dominion of the crown of England. There is no doubt as to the power of the court of king's bench to issue a writ of this sort to a place under the subjection of the crown of England though the propriety of the interference may frequently induce the court to deliberate. To foreign dominions, which belong to a prince who succeeds to the throne of England, this court has no power to send a writ of any kind. They cannot send a writ of habeas corpus to Scotland, or to the Electorate; but to Ireland, the Isle of Man, the plantations, and Guernsey and Jersey (as since the loss of the duchy of Normandy, they have been considered as in some respect annexed to the crown), they may; and formerly such a writ might be directed to Calais, which was a conquest, and yielded to the crown of England by the treaty of Britany. But notwithstanding the power which the court have, yet where they cannot judge of the cause, or give relief upon it, they would not think proper to interpose. Therefore, upon imprisonments in Guernsey and Jersey, in Minorca, and in the plantations, complaints have been frequently made to the king in council, and orders given to bail or discharge, in preference to applications to the court of king's bench for writs of habeas corpus; although the mode of redress by habeas corpus would in some

(1) Nelson v. Whittal, 1 Barn. & Ald. 19.

(2) Clegg v. Levy, 3 Campb. 166. Bothlingk v. Inglis, 3 East, 381. Mostyn v. Fabrigas, Cowp. 174. Collett v. Lord Keith, 2 East, 261.

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cases have been the most appropriate and effectual remedy (1). The respective acts of assembly for establishing the courts of king's bench and common pleas in the islands of St. Christopher and Nevis, expressly reserve the jurisdiction of the court of king's bench in England. (2)

In case of *bankruptcy* and a commission issuing against a trader in this country, all his personal property in the plantations vests in his assignees from the time of the bankruptcy; and therefore if a creditor, having notice of a bankruptcy, and all the parties being resident in England, and the debt contracted in it, avails himself of the process of the law of England, as by making an affidavit of his debt, to proceed by attachment against the bankrupt's effects in one of the colonies, or even in any independent state, and obtain judgment and execution, he cannot retain the money levied from the assignees (3). For by the laws of most countries, personal property is subject to the law which governs the person of the owner; and as the owner in this country may dispose of his personal property abroad as well as of that here, and by the law of England, every thing he can so dispose of himself, at the time of his bankruptcy, is divested out of him, and transferred to his assignees, so therefore the assignment, it is said, under a commission against him here, vests in his assignees all his debts and other personal effects in a foreign country, in all cases where there is no positive law of that country to prevent it. The bankrupt statutes of Elizabeth and James are supposed even to have had property of this kind in contemplation at the time they were passed; the words of the former, which enable the commissioners to dispose of "the bankrupt's money, &c. and debts *wheresoever* they may be found or known," being sufficiently large to include it; and the statute of James against priorities obtained by foreign attachment *according to the custom of London*, using these words, it is said, only by way of instance or illustration, but really meaning all foreign attachments at home or abroad made "*in such manner as is warranted* by the custom of London." Personal property then by the law of nations, following the person, and that property being by the law of England

(1) Rex v. Cowle, 2 Burr. 856. Cro. Jac. 484.

(2) Stokes's Law of Col. 6.

(3) Hunter v. Potts, 4 Term Reports, 182. Sill v. Worswick, 1 Hen. Bla. 665. Philips v. Hunter, 2 Hen. Bla. 402. Dissent. Eyre C. J. Cullen's Bankrupt Law, 243 to 249. Waring v. Knight, Cooke's B. L. 307. Cleve v. Mills, ib. 303. and Mawdesley v. Parke, cited 2 Hen. Bla. 680.

vested in the assignees from the time of the bankruptcy, it is held, that to permit a creditor, subject to the law of England, to obtain a priority against the assignees by attaching the effects abroad, after the bankruptcy, would be to permit a direct contravention of that very law to which the party owes submission and allegiance; and though the judgment of a foreign court obtained by a creditor under such circumstances may be binding between the parties to the suit, yet that a recovery so obtained, considered otherwise than as a recovery to the use of the assignees, would be in violation of an English act of parliament, and that such recovery ought therefore to be taken to be for their use, and upon which they may have an action as for money had and received, the ground of which it is said is collateral to and even in affirmance of the judgment (1).

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It should seem, however, that a creditor in the foreign country obtaining payment of his debt, and afterwards coming to this country, would not be liable to refund to the assignees here, if the law of that country preferred him to the assignees. (2)

On the same principle, in case of *death*, if a British subject, domiciled in England, die here, a probate granted by the prerogative court binds the property in the plantation, and the probate granted there (3). And Lord Hardwicke laid down the rule generally, that debts due in Scotland to an English subject, resident here, who died intestate, were distributable, when recovered, according to the laws of England; and that the question would be the same respecting the goods of an intestate in France or any foreign country (4); and the personal estate of an intestate is distributable according to the laws of the country where he was resident at the time of his death. (5)

3dly, Of the East India Company, and Trade to the East Indies. (6)

In the year 1600, a charter was granted by queen Elizabeth to George Earl of Cumberland, and 215 knights, aldermen, and merchants, constituting them "A body politic and corporate,

(1) Cullen's Bankrupt Law, 243.

(2) Sill v. Worswick, 1 Hen. Bla. 665.

(3) Burn v. Cole, cited, 4 Term Reports, 185.

(4) Thoms v. Watkins, 2 Ves. 35.

(5) Pipon v. Pipon, Ambler's Reports, 25.

(6) See division of this subject, ante, 633.; and as to this company in general, Com. Dig. Trade, D. 1. and see Adolphus, Pol. St British Empire, vol. 4. 521, &c. In the Nabob of Carnatic v. East India Company, 1 Ves. J. 390, it was held that the East India Com-

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by the name of the Governor and Company of Merchants of London trading to the East Indies;" with a clause that none of the queen's subjects, but the company, their servants, or assigns should resort to India without being licensed by the company, on pain of forfeiting the ships and cargoes, with imprisonment till the interlopers should give bond in £1000 to the company not to trade to the same ports again. A power was reserved of determining the charter in two years, upon giving notice to the company, if it should appear unprofitable to the crown; but if otherwise, the queen promised to grant a new charter at the end of fifteen years, the period to which the sole trade was confined, if the company should require it, for the term of fifteen years longer (1). The company existed by the same denomination through many vicissitudes till the year 1708, when it was absorbed by the present "United Company of Merchants trading to the East Indies." Without entering into a detail of the fluctuations in the affairs of the company during the interval, it is sufficient to mention, that in the year 1698, a new company was established under the provisions of the statute 9 & 10 W. 3. c. 44., which is the first act of parliament we meet with on the subject: it is entitled an act for raising a sum, not exceeding two millions, upon a fund for payment of annuities, after the rate of 8 per cent. per annum, and for settling the trade to the East Indies. The substance of the act, so far as relates to this subject, is, that the king might appoint commissioners for taking subscriptions, after Michaelmas 1698, from any persons or corporations (except the bank of England), for raising a sum not exceeding two million pounds, the entire interest being £160,000 per annum, arising from the duty on salt, and certain additional duties on stamped parchment and paper (3). They were empowered to trade either directly themselves or to license others in their stead, but so as not to trade annually for more than the amount of their respective shares or stock (4). Yet the king was empowered *to incorporate* the subscribers by letters patent, under the great seal, into one body politic—as indeed was the primary intention of those who brought forward the act of parliament—

pany have neither an independent nor delegated sovereignty, but are mere subjects. Tucker on Trade, 41. Sir J. Child on Trade, 80, 1.

(1) 2 Anders. 196.

(2) 2 Anders. 595, 596.

(3) 9 & 10 W. 3. c. 44. s. 48. 2 Anders. 636.

(4) Sec. 61.

with perpetual succession and the usual powers (1). It was also provided, that on three years' notice, after Michaelmas 1711, and repayment by parliament of the two millions, the privileges should cease (2). The act also provided that the old East India company, called the Governor and Company of Merchants of London trading to the East Indies, might also trade to India till Michaelmas 1701; and that the separate traders (who were formerly considered interlopers) should be allowed to return to England, so that they did not break bulk in any part of Europe, without incurring penalties (3). On the 5th September 1698, the king incorporated the subscribers as a joint stock exclusive company, by the name of the "English Company trading to the East Indies;" with the customary privileges of having a common seal, of making bye-laws, of suing and being sued, of purchasing an indeterminate quantity of lands, &c.; and with this remarkable clause, which proved the means of afterwards uniting the old and new East India companies, viz. that all corporations and persons who should derive any right or title from any of the subscribers, or their successors, should be esteemed members of the new company, and should be received and admitted as such gratis; that the new company might augment its capital stock; that members at their admission should take an oath of fidelity to the stock company, and should not trade to India on their private account; the sum of £500 was to entitle them to one vote in general courts, and none were to have more than one vote; that the new company might establish the same courts of judicature as the old company had power to do by a charter of king James the second; should maintain a minister and schoolmaster at St. Helena, and in every fort and superior factory, as also a chaplain in every ship of 500 tons and upwards; that one-tenth part of their whole annual exports to India should be in English produce and manufacture (4). When the new company was thus established, the old East India company was still subsisting, whose right of trading to India could not be determined till Michaelmas 1701, and besides the two companies, there were also separate traders; till at length it became necessary for the public tranquillity that a union should be effected between the old and new East India companies. This coalition was made on the

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(1) Sec. 62.

(2) Sec. 79. By 10 Ann. c. 28. to three years notice after 25th March 1733.

(3) Sec. 84. 2 Anders. 637.

(4) Preamble of 6 Ann. c. 17. 2 Anderson, 638.

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22d of July 1702, by an indenture tripartite between the queen and the two companies, wherein it was agreed, that the whole trade to India should be carried on with a united stock for even years, for the benefit of all the members of the new or English company; the old company to have a right and power equal to all the rest of the members in the management of the trade during the seven years, but to keep their stock in their politic or corporate capacity for that term, without transferring it to their particular members (1). It is said, that at this time the force of party was so great, in a matter of comparatively small importance, that these two companies had divided almost the whole kingdom into two opposite parties, of the old and new companies, the former being generally favoured by what was then called the Tory party, and the new one by the Whig party (2). A coalition therefore had the effect of quieting the realm, while it removed the difficulties which the two companies in their divided state had been labouring under. In the year 1707, the company, whose funds now consisted of the united stock of the old and new companies, and of the separate traders, advanced to government £1,200,000 without interest, and the legislature granted them a prolongation of their term; it being now provided, that the exclusive trade should be determinable on the expiration of three years' notice after the 25th of March 1726, and on the repayment of the £3,200,000, which they had advanced to government (3). In order to perfect the union between the two companies, all differences were to be referred to the Earl of Godolphin, then lord high treasurer; the award was to be completed by Michaelmas 1708, when the old charter was to be surrendered, and the company to be styled, "The United Company of Merchants of England trading to the East Indies." (4)

The exclusive trade of the East India company has been considered in the courts of law to be so interwoven with the general interests of the state, that it is not to be regarded as the private right of a corporation, but as a matter of great national concern; any infringement of it is therefore a public mischief and a public wrong, and as such is prohibited at common law; and any insurance or contract, contravening the privileges

(1) 3 Anderson, 13. A. D. 1702.

(2) 2 Anders. Hist. Com. 639. A. D. 1698.

(3) 6 Ann. c. 17. s. 1—9.

(4) 6 Ann. c. 18. s. 13. 3 Anderson, 29.

or laws of the company, are illegal and void (1). In the statute 9 & 10 W. 3 c. 44. the following limits are assigned as those in which the trade of the East India Company is carried on; namely, " in such places and by such ways and passages as are already frequented, found out, and discovered, or which shall hereafter be found out or discovered, and as the traders shall esteem to be fittest or best for them into and from the East Indies, in the countries and parts of Asia and Africa, and into and from the islands, ports, havens, cities and creeks, towns and places of Asia, Africa, and America, or any of them, beyond the Cape of Good Hope to the Streights of Magellan, where any trade or traffic of merchandize is or may be used or had, and to and from every of them (2)." So the statute 33 G. 3. c. 52. enacts, that the East India Company shall have the whole, sole, and exclusive trade and traffic, and the only liberty, use, and privilege of trading, trafficking, and exercising the trade or business of merchandize in, to, and from the East Indies, and in, to, and from all the islands, ports, havens, coasts, cities, towns, and places between the Cape of Good Hope and Streights of Magellan, and the limits mentioned in the act of the 9th year of King William, or in a certain charter of the 5th September in the 10th year of the same King, in as ample and beneficial a manner as the company could thereby or otherwise lawfully trade thereto, subject to the regulations in the 33 G. 3. and to the proviso for determining the exclusive privileges (3). So the statute 9 & 10 W. 3. c. 44. had enacted that the persons authorized to trade to the East Indies should enjoy the trade solely and exclusively (4): and though such parts of that act as inflicted any penalty or forfeiture for illegally trading to the East Indies were repealed by the statute 33 G. 3. c. 52. (5); and though it was provided by that act that no statutes thereby repealed should be set up in bar of any action, yet it was held in the late case of Camden v. Anderson (the circumstances of which case took place before the passing of the 33 G. 3. c. 52. though the action was brought afterwards) that the exclusive privileges conferred by

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(1) Per Eyre, C. J. Camden v. Anderson, 1 Bos. & Pul. 277. Panton v Popham, 9 East, 408. As to the interference of a court of equity, see East India Company v. Sandys, 1 Vern. 127. where a motion for an injunction to stay an interloper's trading to the East Indies till the validity of the patent could be tried, was refused; and see Tyrrel v. Peake, 2 Vern. 155.

(2) 9 & 10 W. 3. c. 44. s. 61; and see s. 62. which speaks of the limits aforesaid.

(3) 33 Geo. 3. c. 52. s. 71.

(4) 9 & 10 W. 3. c. 44. s. 81.

(5) 33 Geo. 3. c. 52. s. 146.

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the statute of William had never been put an end to, but still subsisted in the manner provided for in that act. (1) Therefore, when a ship employed in the transport of convicts and government stores had obtained a licence from the East India Company to proceed to Botany Bay, a place within the limits of the company, and to go afterwards to Bombay, in order to procure a return cargo, and the ship, instead of complying with the terms of the licence, loaded at Goa, a port in the East Indies, with goods different from those which the licence specified, the voyage was held illegal as being an infringement of the privileges of the East India Company. (2)

Present exclusive Trade of East India Company.

But the limits of the exclusive trade of the East India company have been considerably narrowed by a late act of parliament. This statute provides that the trade with China and the trade in tea to and from all places betwen the Cape of Good Hope and the Streights of Magellan, shall continue in the *exclusive* possession of the company for the term of twenty-one years (3). Otherwise the trade is open; and the following provisions have been made to secure to British subjects in general a participation in the profits of the East India trade. Since the 10th of April 1814, it has been lawful for any of his majesty's subjects, in common with the East India Company, to export goods from this country to places within the limits of the company's charter, except to China, and also in common with the company, to import all the produce of the East Indies, except tea, into this kingdom from those places (4) The importation may take place though the goods are not of the growth of the country from which they have been brought, and though they were not brought from the place where they are usually shipped for transportation, notwithstanding the provisions in the navigation act (5). Tea cannot be shipped in the East Indies without the written licence of the company, nor imported into this kingdom from any place whatever (6); nor can military stores be carried to certain places without the written licence of the company (7). Ships in private trade must clear out from some port

Export and import, &c. by private Traders.

Tea.

(1) Camden v. Anderson, 8 T. R. 723. 1 Bos. & Pul. 272. S. C. A. D. 1796.

(2) Same case. See also Panton v. Popham, 9 East, 418. Lightfoot v. Tenant, 1 Bos. & Pul. 551. Ex parte Mather, 3 Ves. J. 373. Tenant v. Elliott, 1 Bos. & Pul. 3.

(3) 53 Geo. 3. c. 155. s. 2. continues provisions of 33 G. 3. c. 52. and Irish Act.

(4) 53 Geo. 3. c. 155. s. 6.

(5) 53 Geo. 3. c. 155. s. 7.

(6) 53 Geo. 3. c. 155. s. 8.

(7) 53 Geo. 3. c. 155. s. 9.

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of the united kingdom, and all goods imported in private trade must be brought to some port in the united kingdom, which shall have been declared fit by order in council (1). No vessel engaged in private trade can proceed to a place within the limits of the company's charter on the continent of Asia, from the river Indus to the town of Malacca inclusively; nor to (2) any island in the government of the company to the north of the equator, nor to the company's factory of Bencoolen or its dependencies, without a licence from the board of directors; nor can any vessel, unless specially authorized, proceed to a port or place within those limits, except to one of the principal settlements of Fort William, Fort St. George, Bombay, and Prince of Wales's Island. The licence is to be issued on application to the court of directors in a form settled by the court, with the approbation of the board of controul; the special authority is also to be granted by the court of directors, if they think fit to accede to the application, if not it is to be submitted to the board of controul (3). No ship in the private trade clearing out from the united kingdom, shall proceed to any place situate further to the northward than eleven degreees of south latitude, and between the 64th and 150th degrees of east longitude from London, (except places within the limits just described), without a licence from the board of controul (4). No vessel, the registered measurement of which is less than 350 tons, except packets employed by the company, is allowed to clear out to the East Indies, or admitted into this country from any place within the company's limits (5). It was also provided by the statute 53 Geo. 3. c. 155. that such further provisions should be made by authority of parliament during the further term granted by the act to the East India company, as might from time to time be deemed necessary for enabling his majesty's subjects to carry on trade directly or circuitously between all places without the limits of the company's charter, and of places within those limits, except China, as well as between the united kingdom and the East Indian limits, but without prejudice to the restrictions, as to the resort to and residence of persons in the East Indies (6). A statute passed afterwards, enacts that it shall be lawful for the East India company, and also for any other of his majesty's subjects to trade in ships proceeding on

(1) 53 Geo. 3. c. 155. s. 10.
(2) In statute "in."
(3) 55 Geo. 3. c. 155. s. 11.
(4) 53 Geo. 3. c. 155. s. 12.
(5) 53 Geo. 3. c. 155. s. 13.
(6) 53 Geo. 3. c. 155. s. 20.

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voyages from this country to places within the chartered limits, at any intermediate places between the united kingdom and the East Indies, in North or South America, except the American plantations, and at the island of Madeira, the Canaries, and Cape de Verd Islands, and the Cape of Good Hope; and to take on board goods which may be legally carried from such intermediate places to places within the limits of the company's charter. And also to trade at intermediate places on voyages from the East Indies to this country. His majesty's subjects may also carry on trade directly or circuitously between all places within the limits of the company's charter except China (1). But tea is a commodity to which this enactment does not extend. (2)

The residence of persons in India is also laid under some restrictions. British subjects may indeed proceed to and reside at any place situate more to the southward than 11 degrees of south latitude, or more to the westward than 64 degrees, or more to the eastward than 150 degrees of east longitude from London, for any lawful purposes, without any licence whatever; but otherwise, a licence must be obtained (3). The government of the company at their several presidencies are not allowed to authorize the residence of a British subject in India, if he has gone thither after the 10th of April 1814, unless such person has been previously furnished with a licence or certificate from the court of directors, or has been otherwise authorized by law to reside there, though any governor general, or governor of one of the presidencies, may, on extraordinary occasions, authorize the residence of a British subject in a place under the government of his presidency, till the pleasure of the court of directors is known; provided a copy of the special licence, and of the reasons of its being granted, together with an application for a licence from the court of directors, is afterwards transmitted to that court (4). Also, the board of controul may, by licence in writing, authorise any person to proceed to and reside at any place situate more to the northward than 11 degrees of south latitude, and between the 64th & 150th degrees of east longitude from London; and not being on the continent of Asia between the river Indus and the town of Malacca, nor in any island under the government of the company, lying to the northward of the

(1) 54 Geo. 3. c. 34. s. 1.
(2) 54 Geo. 3. c. 34. s. 1.
(3) 53 Geo. 3. c. 155. s. 39. non obstante any statute or charter.
(4) 53 Geo. 3. c. 155. s. 37.

equator, nor at the company's factory at Bencoolen or its dependencies, nor within the dominions of the Emperor of China (1). Provision has been also made against the undue refusal of licences by the court of directors; the preamble to which regulation sets forth the following reasons as explanatory of the intention with which it was made, " That it is the duty of this country to promote the interest and happiness of the native inhabitants of our dominions in India, and that such measures ought to be adopted as may tend to the introduction among them of useful knowledge and of religious and moral improvement; that in furtherance of these objects sufficient facilities ought to be afforded by law to persons desirous of going to and remaining in India for the purpose of accomplishing those benevolent designs, so as the authority of the local governments respecting the intercourse of Europeans with the interior of the country be preserved, and the principles of the British government, on which the natives of India have hitherto relied for the free exercise of their religion, be inviolably maintained; and that it was expedient to make provision for granting permission to persons desirous of going to and remaining in India for these purposes or for other lawful purposes. The act goes on to provide, that when application is made to the court of directors for permission to proceed to the East Indies, and the court do not think fit to comply with the application, they shall transmit it within a month from the receipt to the board of controul; and if the board see no sufficient objection, they may direct that any persons shall be allowed to proceed to any of the principal settlements of the company, and shall be furnished by the court of directors with a certificate in the form prescribed by the board, signifying that such person has proceeded with the cognizance and under the sanction of the court of directors. Persons who have obtained the certificate are entitled to the countenance and protection of the governments within the limits of the charter, so long as they conduct themselves with propriety (2). All persons, on their arrival, are subject to the rules in force within the limits of the company's government (3). If any person shall so conduct himself, as in the judgment of the governor general, or governor of the presidency, within which he is found to have forfeited his claim to the countenance and protection of the government, his certificate or licence to

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(1) 53 Geo. 3. c. 155. s. 38.

(2) 55 Geo. 3. c. 155. s. 33. and see s. 34.

(3) 53 Geo. 3. c. 155. s. 35.

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reside may be declared void by an order of the governor general or governor; and after the day named in the order, such person shall be deemed to be residing without licence or authority, and may be sent home to the united kingdom; but no person whose certificate has been so declared void shall be liable to prosecution for an unauthorised residence till two months after notice has been given of the order, either by serving a copy or by publication in the presidency gazette (1). If any British subjects, when not licensed by the company, or otherwise lawfully authorised, shall, before the determination of the term granted to the company, either directly or indirectly, visit the East Indies, or other privileged parts, or sail thereto, or be found there in any other manner than is prescribed by act of parliament, and the terms and conditions of the licence or certificate, they shall be deemed to have unlawfully traded there, and the same penalties attach as were provided by the 33 G. 3. c. 52., or any other act now in force (2) securing the exclusive trade to the East India company. A proviso excepts vessels driven by stress of weather or accident more to the northward than 11 degrees south latitude, and between the 64th and 150th degrees east longitude, which shall return within those limits with as much convenient speed as the safety of the vessel will admit (3). Vessels so circumstanced are not liable to any penalty of forfeiture; but the proof lies on the party claiming the benefit of the exemption (4). If any British subject is found in the East Indies without a proper licence or authority, and the govermental authorities do not deem it advisable to prosecute for a misdemeanor, or send the offender to the united kingdom, an information may be exhibited by the advocate general or other principal law officer of the company, at any of their presidencies in the supreme court of judicature at Fort William, or the supreme court of judicature at Madras, or the recorder's court at Bombay, or the court of judicature at Prince of Wales's Island; the person may be arrested and brought before the court, and on proof of the substance of the information, he may be required to produce or prove his licence or authority for resorting to the East Indies and residing there. On failure to give due proof, or not accounting for the absence of testimony, he may be fined for the first offence 2,000 rupees, and be imprisoned

(1) 53 Geo. 3. c. 155. s. 36.

(2) 33 Geo. 3. c. 52. s. 129, 130—135. and s. 78, 79, 80. and see post, 671, 2.

(3) 53 Geo. 3. c. 155. s. 41.

(4) Same section.

two months, if the fine be not paid; for a second offence, the fine may be 4,000 rupees, and if the fine is not paid, four months imprisonment. But no person convicted under this provision is liable to be prosecuted for a misdemeanor, or sent to the united kingdom, for a residence in the East Indies, before the date of the conviction (1). As cases may exist in which it is proper to send home persons unlawfully resident in India, though they are not intended to be prosecuted for a misdemeanor, power is given to the company to send persons so resident without proper licence or authority, to this country (2), without subjecting them to further punishment, but then they are entitled to be discharged in any port in the united kingdom in which the vessel is first moored in safety. (3)

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The statute 33 Geo. 3. c. 52. is still in force in many of its provisions with respect to the trade of the East India Company, although, since the passing of that act, the trade has been much opened in the manner we have stated. Among other regulations, it enacts, that if any of his majesty's subjects, unless licensed by the company, or otherwise thereunto lawfully authorised, shall, while the sole trade continues, visit, frequent, or trade to the East Indies contrary to the provisions of the act, the offender shall incur the forfeiture of his ship and goods and the proceeds thereof, and double the value; one-fourth part to the person seizing or informing, and three-fourths to the company, who must defray the expences of the prosecution out of their share (4). Any subject of his majesty, trading without licence or authority, is guilty of a misdemeanor, punishable by fine and imprisonment (5); the authorities in India may arrest the offender, and send him to England to take his trial (6). If a person who has been dismissed from the company's service, or whose licence has expired, remain in the East Indies, he may be treated as an illicit trader (7). All merchandize and bullion shipped for India, except the property of the company and of persons authorized by the act, and all goods taken out of any ship on her homeward passage, before her arrival in England, shall be forfeited, together with double the value; and the commander or officer knowingly permitting such unlawful loading shall forfeit

(1) 53 Geo. 3. c. 155. s. 101.
(2) 53 Geo. 3. c. 155. s. 104.
(3) 53 Geo. 3. c. 155. s. 104.
(4) 33 Geo. 3. s. 52. s. 129, 130.
(5) 33 Geo. 3. c. 52. s. 131.
(6) 33 Geo. 3. c. 52. s. 132, 133.
(7) 33 Geo. 3. c. 52. s. 134.

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£1000 for every offence, besides all the wages owing to him, and be rendered incapable of serving the company ever after. (1)

Trade of Foreigners with British East Indies, and of East India Vessels.

The 33 Geo. 3. c. 52. makes it unlawful for any British subject to procure, solicit, obtain, or act under a commission or authority from a foreign prince to go to the East Indies, under a penalty of £500 (2). It was also one of the regulations of the 33 Geo. 3., that while the sole trade of the company continued as provided for by the act, it should not be lawful for a subject of his majesty belonging to Great Britain or the West Indian plantations, to be concerned in sending any kind of goods, the produce or manufacture of the East Indies or China, by the way of Suez, or by any other channel, to Europe, otherwise than was provided by the act; and if any subject should be concerned in such trade on his own account, he should forfeit to the company double the value of the goods unlawfully sent to Europe (3). But it was provided that this restriction should not extend to preclude any of the company's servants (except such as might be specially prohibited by any law or statute, or by any order of the company or their governments abroad, and except in respect of the inland trade in salt, beetle nut, tobacco, and rice), or any free merchants licensed by the company to reside in the East Indies, from buying goods in India, and selling them again in that country to the subjects of any *foreign* nation or state, or from acting as agents or factors in importing or exporting, buying or selling goods in India *bonâ fide* for or on the account of any foreign company or foreign merchant (4). In the construction of this provision it was holden, that though foreigners were allowed to buy and sell in India, they were not allowed to export in foreign vessels; for the 33 Geo. 3. was not intended to repeal the navigation act, which was considered to extend to the East Indies, and was held to prohibit such an exportation in any other than a British vessel (5). But an act of parliament has been passed to allow the ships of foreign countries in amity with his majesty to trade to India, as they may be allowed by the directors

(1) 33 Geo. 3. c. 52. s. 135.
(2) 33 Geo. 3. c. 52. s. 136.
(3) 33 Geo. 3. c. 52. s. 138.
(4) 33 Geo. 3. c. 52. s. 139.
(5) Chalmers v. Bell, 3 Bos. & Pul. 604. Murck v. Abel, 3 Bos. & Pul. 35. See the late act for exempting the territories within the limits of the East India company's charter from certain of the navigation laws, 57 Geo. 3. c. 95. See also 25 Geo. 2. c. 26. now expired, and 37 Geo. 3. c. 117.

of the East India company (1). The statute 7 Geo. 1. st. 1. c. 21. was passed to prevent British subjects from trading to the East Indies under foreign commissions. It provides, that all contracts entered into by any of his majesty's subjects, or any person in trust for them, for the loan of money by way of bottomry on ships in the service of foreigners, bound or designed to trade within the limits of the East India company's charter, or for the loading or supplying such ships with cargoes, or with any provisions, stores, or necessaries; and all partnerships made or entered into relating to any such voyage or the profits thereof, and all agreements for the wages of persons serving on board such ships, shall be altogether void (2). A question arose on this statute, whether a respondentia bond, given for goods shipped by a British subject at Calcutta on board an American, bound homeward from thence to Rhode Island in America, was to be deemed illegal? and it seemed to be the opinion of the court that it was (3). A doubt formerly arose on the navigation act respecting the propriety of trading to the East Indies in ships belonging to the East India company, as there were many foreigners proprietors of stock in the company. But it has been enacted, that all ships belonging to the East India company, whether built or purchased by them, shall be deemed British ships, and that the company shall enjoy the same advantages in respect of those ships as were given by the navigation act to the owners of vessels wholly belonging to British subjects, provided they are navigated in the manner prescribed by law respecting British-built vessels. (4)

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The provisions respecting the registration and mode of navigating vessels, as they are also enacted in exclusion of foreign interests, may be conveniently mentioned here. The statute 55 Geo. 3. c. 116. provides for the registration of vessels built in India, so as to entitle them to the privileges of British-built ships. But no vessel need be registered that is built within the limits of the company's charter, and is of less than 350 tons burthen, nor a vessel built within those limits, which at the time of passing the act was the property of any of his majesty's subjects there, and also employed in trade solely within those limits, nor a vessel that was building within the limits before the 1st Jan. 1816, on account

(1) 37 Geo. 3. c. 117. s. 1. and s. 2, 3. See last note.

(2) 7 Geo. 1. st. 1. c. 21. s. 2. See 37 Geo. 3. c. 117.

(3) Sumner v. Green, 1 Hen. Bla. 301.

(4) 21 Geo. 3. c. 65. s. 33.

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of any of his majesty's subjects there, and which shall be employed in trade solely within those limits (1). No vessel built in any places in the government of the East India company, or belonging to his majesty, within the limits of the company's charter, and registered under the authority of the act as British-built and owned by subjects of his majesty, and navigated according to law, shall be entitled to the privileges of British-built ships, owned, registered and navigated according to law, in any voyage or trade beyond the limits of the company's charter, except such as are specified in 53 Geo. 3. c. 155. and 54 Geo. 3. c. 34 (2). But these regulations do not affect the privilege of any vessel registered as British-built at the time of passing the 55 Geo. 3. c. 116., nor do they effect the right of any ship that was then built or building, to be registered as British-built (3). The 55 Geo. 3. was passed to make *further* provisions for the registry of ships built in India (4), some of the requisites of the former statutes of registry being such as could not be complied with in the East Indies. Whether, however, ships built in India were or were not affected by the registry acts before the passing of the 55 Geo. 3. c. 116. does not seem to have been precisely determined; for though the question arose in a late case, it does not appear to have been decided solely on the operation of the acts of registry. The circumstances were as follows: a person who had contracted for a ship to be built for him in the East Indies, agreed, during the time of the building, to sell a share to another, who paid part of the price in pursuance of the agreement, and when the ship arrived in England she was registered, but the name of the proposed vendee did not appear upon the register, although he had been accounted with as part owner. The court determined that this person had no legal interest in the ship; but it seems to have been thought, that independently of the statutes of registry, the effect of the contract and transfer that took place in the East Indies, was not sufficient to pass the property (5). Asiatic sailors, lascars, or natives of India, though born in the territories of his majesty or the East India company, are not regarded as British seamen within the meaning of the registry acts or other statutes (6). But every vessel duly registered, as provided for by the 55 Geo. 3. and carrying on trade between India and this country, if manned in part with lascars or natives of India, is to

(1) 55 Geo. 3. c. 116. s. 3.
(2) 55 Geo. 3. c. 116. s. 4.
(3) 55 Geo. 3. c. 116. s. 5.
(4) 55 Geo. 3. c. 116. title and preamble.
(5) Stringer v. Murray, 2 Barn. & Ald. 248.
(6) 55 Geo. 3. c 116. s. 6.

be deemed navigated according to law when commanded by a British master and navigated by seven British seamen, for every 100 tons of her registered burthen; though the number of such British seamen may not be equal to the proportion of three-fourths of the whole crew (1). Also, on application to any of the governments in India by the owner or commander of a vessel, after it has been ascertained by due inquiry, that a sufficient number of British seamen cannot be procured for the crew of a ship sailing from that quarter, the governor is required, within ten days after the application, to certify the same, and license the ship to sail with a less proportion of British seamen; and every such ship, having on board such licence, shall be deemed navigated according to law, notwithstanding such deficiency of British seamen, until her arrival at her port of destination in the United Kingdom, though on the voyage back she must have the due proportion of seven British seamen to every 100 tons (2). No statute requires any number of British seamen to be on board as part of the crew of a vessel employed in trade only, within the limits of the charter of the East India company, inclusively of the Cape of Good Hope; nor does the law prevent any vessel while so employed from being manned and navigated wholly or in any proportion, as to Asiatic sailors or lascars, or natives of any places within the limits of the charter. (3)

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The mode in which the exclusive privileges of the East India company may be determined, is contained in the following provisions of the stat. 53 Geo. 3. (4) The territorial acquisitions mentioned in the 33 Geo. 3. c. 52., together with such of the territorial acquisitions since obtained on the continent of Asia, or in any islands to the north of the equator, as are now in the possession and under the government of the company, with the revenues thereof, are to remain in their possession and government (subject to such powers for the superintendance of all concerns that relate to the civil or military government, or revenues of those territories) and to such other regulations as were made by any act of parliament before the 53 Geo. 3. c. 155. as well as

(1) 55 Geo. 3. c. 116. s. 7.

(2) 55 Geo. 3. c. 116. s. 8.

(3) 55 Geo. 3. c. 116. s. 9. The provisions respecting East India ships are in the following statutes, 53 Geo. 3. c. 155. s. 13. modified by 59 Geo. 3. c. 122. 21 Geo. 3. c. 65. s. 33. 37 Geo. 3. c. 117. s. 1, 2, 3. 58 Geo. 3. c. 83. s. 1. to 15. 57 Geo. 3. c. 120. s. 1 to 9. 54 Geo. 3. c. 134. s. 2, 3. 55 Geo. 3. c. 116. Pope, 88.

(4) 53 Geo. 3. c. 155. s. 1. recites 33 Geo. 3. c. 52. at which time a similar provision was made.

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by that act) for a further term of twenty-one years, from the 10th of April 1814. After the 10th of April 1831, a notice may be given by parliament to determine the privileges to expire in three years; and then, on payment of any sum due to the company, by virtue of the provisions of an act of parliament of Ireland of the 33d of the king, the term granted to the company, and the exclusive trade it now enjoys, will cease and determine (1). But the corporate capacity of the company will not cease, nor will it be precluded, after the determination of the exclusive trade, from carrying on a free trade with the East Indies, with all or any part of its joint stock in trade and effects, in common with his majesty's other subjects (2). A clause in the act of 53 Geo. 3. provides, that it shall not prejudice or affect the undoubted sovereignty of the crown over the territorial acquisitions of the East India company, nor preclude the company after the determination of the exclusive trade, from the enjoyment of any rights to which they may be entitled. (3)

By the statute 13 Geo. 3. c. 63. s. 13. the king is authorized by charter to establish a supreme court of judicature at Fort William in Bengal, with full power to exercise and perform all civil, criminal, admiralty, and ecclesiastical jurisdiction, to hear and determine all complaints against any of his majesty's subjects for crimes, misdemeanors and oppressions, and suits and actions for debts, and other causes of complaint, subject to an appeal to his majesty in council.

4thly, The West India Trade. (4)

The trade to the West Indies is principally regulated by the navigation laws, the provisions of which we have already had occasion to consider. The object and policy of this part of our commercial code were also considered in a former place (5). One of the statutes, the 7 & 8 W. 3. c. 22. enacts, that no goods shall be imported into or exported out of any colony or plantation belonging to his majesty or in his possession, either in Asia, Africa, or America, or shall be laden or carried from one place in such plantations to another, or to England, Wales, or Berwick, in any ship that is not of the *built* of England, or of the built of Ireland or the plantations, and

(1) 53 Geo. 3. c. 155. s. 3. similar provision, 33 Geo. 3. c. 52. s. 73.

(2) 53 Geo. 3. c. 155. s. 4. similar provision, 33 Geo. 3. c. 52. s. 74.

(3) 53 Geo. 3. c. 155. s. 95.

(4) See division of the subject, ante 633. See Observations, Adolphus, Pol. Stat. British Empire, vol. 3. 140. and id. vol. 4. 653 to 689.

(5) Ante, 211.

wholly owned by the people thereof, and navigated with masters and three-fourths of the mariners of those places; except such ships as are taken as prize, and condemnation thereof made in one of the courts of admiralty in England, Ireland, or the plantations, to be navigated by the master and three-fourths of the mariners English or of the plantations, and whereof the property doth belong to Englishmen (1). This statute contains a clause enacting, that all laws, by-laws, usages, or customs in any of the plantations that are repugnant to the act, or to any other law made in respect of the plantations, shall be null and void (2). The statute 7 & 8 W. 3. and the 12 Car. 2. c. 18. and 15 Car. 2. c. 7. are the leading provisions that relate to the West India trade (3). During the late war, the exigencies of the public service were found to require, that the provisions of the navigation law should be occasionally dispensed with; and by one act, the importation of all sorts of wool into Great Britain was allowed to take place during the war in foreign-built ships (4). This statute was held not to authorize the importation of *cotton wool* (5) into Great Britain in foreign vessels, so that the conveyance of cotton wool on a voyage from Amelia Island to Liverpool (6), as well as from Pensacola to Liverpool (7), in a foreign-built and foreign-navigated ship, was held illegal. The other provisions that relate to the West India trade are in general of too peculiar and confined a nature to require a detailed enumeration. The trade in cocoa nuts, coffee, spirits, and sugar, is principally regulated by the statute 5 Geo. 3. c. 28. perpetual by 49 Geo. 3. c. 20. s. 3. and 5. 23 Geo. 3. c. 79. s. 8. 4 Geo. 3. c. 15. s. 18. 20, 21, 22. 18 Geo. 3. c. 58. s. 1. 3. 5, 6, and also s. 2. 20 Geo. 3. c. 7. s. 1. 47 Geo. 3. sess. 2. c. 30. s. 15. 47 Geo. 3. sess. 1. c. 48. s. 2. (8) The collection of the duties is regulated by the 25 Car. 2. c. 7. s. 2. 7 & 8 W. 3. c. 22. s. 8. 4 Geo. 3. c. 15. s. 1—41.

4thly, Of the West India Trade.

(1) 7 & 8 W. 3. c. 22. s. 2. see also s. 3, 4. 6. 9. 10.

(2) 7 & 8 W. 3. c. 22. s. 9.

(3) Ante 211, &c.

(4) 43 Geo. 3. c. 153. s. 13. enlarged by 55 Geo. 3. c. 8., but now expired.

(5) The statute itself (43 Geo. 3. c. 153. s. 13.) had made a distinction between wool and cotton wool, as both terms were mentioned in different provisions. There might be a reason for the provision as applied to wool that grows on the back of the animal, which could not apply to wool, the produce of the cotton plant.

(6) Pearce v. Cowie, 4 Campb. 363. 1 Holt, 69. S. C. Haines v. Busk, 5 Taunt. 521. 12 Car. 2. c. 18. s. 3.

(7) Oliverson v. Longham, 4 M. & S. 346. Haines v. Busk, 5 Taunt. 521. 12 Car. 2. c. 18. s. 3.

(8) Vide Pope, tit. West Indies.

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and s 8, 9. 6 Geo. 3. c. 52. s. 4, 5. 12. 15, 16, 17, 18, 19. 21. 7 Geo. 3. c. 46. s. 3, 4. and s. 1. 18 Geo. 3. c. 12. 31 Geo. 3. c. 31. s. 46, 47. (1) The entry, landing, and shipping of goods by stat. 15 Car. 2. c. 7, 8, 9. 19 Geo. 2. c. 30. s. 3, 4. 4 Geo. 3. c. 15. s. 29, 30, 31, 32. 7 Geo. 3. c. 46. s. 9. The exportation of hats or felts from the plantations, is regulated by 5 Geo. 2. c. 22. So of lumber, by 4 Geo. 3. c. 15. s. 28. 8 Geo. 1. c. 12. 5 Geo. 3. c. 45. s. 22. So of wool, by 10 & 11 W. 3. c. 10. s. 29. 46 Geo. 3. c. 17. s. 1. So various other regulations respecting different commodities, as ginger, indigo, molasses, pimento, rice, silk, skins and furs, tobacco, whalefins, wood, and cotton wool, are to be found in the navigation laws, the provisions of which have been already commented upon. (1)

There are also some general regulations deserving notice with respect to the trade to the foreign West Indies. The 28 Geo. 3. c. 6. enacts, that no tobacco, pitch, tar, turpentine, hemp, flax, masts, yards, bowsprits, staves, heading boards, timber, shingles, or lumber of any sort; bread, biscuit, flour, peas, beans, potatoes, wheat, rice, oats, barley, or grain of any sort, shall be imported into any island under the dominion of his majesty in the West Indies, in which description the Bahama Islands and the Bermuda or Somers Islands are included, from any island in the West Indies (2) in the government of any foreign European sovereign, under the penalty of the forfeiture thereof, and of the vessel in which the same shall be imported (3). But in a case of public emergency or distress, it is lawful for the governors, lieutenant governors, or commanders-in-chief, of any of the islands in the West Indies under the dominion of his majesty, with the consent of their respective councils, to authorise the importation of these goods for a limited time, from any island in the West Indies under the dominion of a foreign European state, for the supply of the inhabitants of our islands, provided that such goods so authorised to be imported shall not be imported except by British subjects, and in British-built ships owned by his majesty's subjects and navigated according to law. (4)

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(1) See Pope, tit. British West Indies. Ante 221.

(2) See 56 Geo. 3. c. 91. s. 1. as to Demerara, Berbice, and Essequibo.

(3) 28 Geo. 3. c. 6. s. 10.

(4) 28 Geo. 3. c. 6. s. 11. Pope, tit. 133. See also other regulations in Pope's Laws of the Customs and Excise, tit. West Indies.

The Hudson's Bay company was incorporated by a charter of king Charles the second, bearing date the 2d May 1670. The charter provided that the company should have the exclusive trade of all the seas, bays, streights, creeks, lakes, rivers, and sounds in whatsoever latitude they be, that lay within the entrance of the streight commonly called Hudson's Streights, together with all the lands, countries, and territories upon the coasts and confines of the said seas, streights, and bays, which were not then actually possessed by any of the king's subjects, or the subjects of any other christian prince, together with the fishing of all sorts of fish, of whales, sturgeons, and all other royal fishes in those places, together with the royalty of the sea, within the same limits, as also all mines royal of gold, silver, gems, and precious stones, and that the land should from thenceforward be reputed one of the plantations and colonies in America, and be called Rupert's Land, a name given it in honour of Prince Rupert, who, in conjunction with seventeen other persons of quality and distinction, sent out Captain Newland to Hudson's Bay, when he settled there at a place called Port Jackson (2). Dean Tucker, in observing that most of the charters of this nature, conferring exclusive privileges, which were granted in the time of Charles, were made with a view of enabling government to raise money, instances the charter for the Hudson's Bay company, which he observes is a grant without any bounds or limits of seas, mountains; rivers, degrees of latitude or longitude, and therefore, if valid, might empower the company to challenge all the lands of America, which were not disposed of by prior grants, as well as the coasts on Hudson's Bay (3). But the charter has never been confirmed by act of parliament, so that the exclusive trade is no longer in existence (4). In Anderson's History of Commerce it is stated, that all the advantages which this company has over other adventurers to the same parts, is the benefit of their own forts, by means of which their agents can reside in so inhospitable a country during the winter, for the purpose of trading with the savages to supply their ships; and that thereby they have not only more safety and protection, but also more experience in trading with the native Indians thereabouts than any private adventurers can have, whose ships

5thly, The Hudson's Bay Company. (1)

(1) See division of subject, ante 633. and see 2 Beawes, Lex Mer. 6 ed. Adolphus, Pol. Stat. British Empire, vol. 4. 641.

(2) 2 Anders. Hist. Com. 514, 5.

(3) Tucker on Trade, 68, 69.

(4) 2 Anders. Hist. Com. 515, 516.

5thly, The Hudson's Bay Company.

can only remain with safety in the bay during a part of the summer. These advantages on the company's side are said to be so considerable, that they are not likely to be rivalled successfully by any private adventurers (1). In 1782 several of the company's settlements and forts were destroyed by a French squadron. (2)

6thly, The South Sea Company. (3)

The South Sea company was established in the reign of queen Anne, by a charter granted in pursuance of the statute 9 Ann. c. 21. The charter was dated the 8th of September 1711, and incorporated the subscribers by the name of The Governor and Company of Merchants of Great Britain trading to the South Seas and other parts of America, and for encouraging the fishery (4). It was provided by the statute, that the company should have the sole trade to and from all places in America on the east side thereof, from the river Oronoco to the southernmost part of Terra del Fuego, and on the west side from the southernmost part of Terra del Fuego, through the South Seas, to the northernmost parts of America, and to and from all countries within those limits, which were reputed to belong to the crown of Spain, not exceeding 300 leagues from the continent of America, between the southernmost part of Terra del Fuego, and the northernmost part of America on the west side (except the kingdom of Brasil, and such other places on the east side of America as were then in the actual possession of the crown of Portugal, and the country of Surinam, in the possession of the States General of the United Provinces). The exclusive rights of the company were protected by a provision that only themselves, or persons entrusted by them, should be allowed to traffic within the prescribed limits, and severe penalties were imposed on any of his majesty's subjects, except those who were licensed by the company, who should presume to visit, trade, or adventure in the South Seas, or who should hire, freight, fit out, or lade ships with intent to visit the places included in the company's charter. (5) The South Sea company could not grant a retrospective licence in order to legalize a voyage after it had been performed, but it was necessary that the licence should precede the

(1) 2 Anders. Hist. Com. 516. A. D. 1670.

(2) 4 Anders. Hist. Com. 1782.

(3) See division of the subject, ante 633. Adolphus, Pol. Stat. British Empire, vol. 3. 219. Beawes Lex Mer. 2 vol. 84. 55 Geo. 3. c. 57.

(4) 3 Anders. Hist. Com. 45.

(5) 9 Ann. c. 21. s. 47—49. Toulmin v. Anderson, 1 Taunt. 232.

6thly, The South Sea Company.

undertaking (1). Also, a voyage from the South Seas without a licence from the company was held illegal, although the goods brought home were the proceeds of the outward cargo of a vessel that had been regularly licensed (2). But it has been held that t is no infringement of the rights of the South Sea company to send home in a ship of war, from a place within the limits of the charter, dollars that were the proceeds of an adventure to Portuguese America, in a vessel that had been named and licensed by the company (3). But the exclusive privileges of the South Sea company have been lately abolished by the statute 55 Geo. 3. c. 57. (4), when they were purchased by the legislature for the sum of £610,464 3s. three per cent. stock: and antecedently to their total abolition, they had been occasionally modified and limited by act of parliament, as by the statute 42 Geo. 3. c. 77., which was passed principally with a view to authorize *British-built* ships to carry on the fisheries in the Pacific Ocean, without being licensed by the East India company or the South Sea company. The statute ordained, that any British-built ship, owned and navigated according to law, should be allowed to pass through the Streights of Magellan or round Cape Horn, and to carry on the fisheries in the Pacific Ocean from Cape Horn to 180 degrees of west longitude, and to *trade* within those limits, without having obtained any licence or permission from the East India company or the South Sea company. British vessels were authorized by the act to trade as well as to fish on the western coast of South America; that is, a vessel might proceed within the favoured limits, either for the sole purpose of trade or for the sole purpose of fishing; or the adventure might combine both fishing and trade (5). The statute 45 Geo. 3. c. 34. also made it lawful for his majesty, during the existing war, to grant licences to British subjects to import American produce into this country in a foreign ship: and on the construction of this act, it was at first supposed to be lawful during the war for British subjects to employ foreign ships to bring goods from the western coast of South America; but this construction was afterwards held to be erroneous, and it was determined that foreign ships could not trade during the war to the

(1) Cowie v. Barber, 4 M. & S. 16. 4 Campb. 100. S. C. Hobbs v. Hannam, 3 Campb. 95.

(2) Same cases.

(3) Hodgson v. Fullerton, 4 Taunt .787.

(4) And see 55 Geo. 3. c. 141.

(5) Jacob v. Jansen, 3 Taunt. 534. Gill v. Dunlop, 2 Marsh. 440. 7 Taunt. 193. S. C. 1 Moore, 79. S. C. reversed in error, but on another point, 1 Barn. & Ald. 334.

6thly, The South Sea Company.

western coast of South America without a licence from the South Sea company (1). As the privileges of the company were private rights, they could not be taken away without an express declaration on the part of the legislature, or without some clear and unequivocal expressions, from which a plain intention to that effect might be inferred. Now the stat. 45 Geo. 3. contained no allusion to the South Sea company, nor was it intended to operate any longer than during a season of war, when the great demand for British ships and British seamen was thought to require a relaxation of those acts of navigation by which the vessels of another state are prohibited from importing foreign produce into this country (2). The 47 Geo. 3. sess. 1. c. 23. divested the South Sea company of the exclusive privilege of trading to all places belonging to or in the possession or under the dominion or protection of his majesty, on the east side of America, from the river Oronoco to the southernmost part of Terra del Fuego; and on the west side of America from the southernmost part of Terra del Fuego, through the South Seas to the northernmost part of America. Buenos Ayres, which had been captured by the British forces, and had remained a short time in their possession, but was retaken on the 12th of August 1806, could not by virtue of the 47 Geo. 3. be lawfully traded to in the month of September in that year, as it was not under the dominion of his majesty, and an adventure to that place was deemed illegal, though the goods were shipped under the sanction of an order in council, purporting to authorize the voyage, and the recapture of Buenos Ayres was unknown when the voyage was commenced. (3)

7thly, The African Company. (4)

Even in the year 1536 it appears that the English resorted to Guinea and the western coast of Africa for the purposes of trade; but the disappointments they met with are said by historians to have occasioned this trade to be neglected till 1618, when King James 1st granted an exclusive charter to Sir Robert Rich and other merchants of London, for raising a joint stock for the trade to Guinea (5). A second company for trade to Africa was created by King Charles, in the 7th year of his reign (7). A

(1) Dunlop v. Gill, 1 Barn. & Ald. 334. 7 Taunt. 193. S. C. 2 Marsh. 440. S. C.

(2) Same case.

(3) Wilkinson v. Loudonsark, 3 M. & S. 117. Toulmin v. Anderson, 1 Taunt. 227.

(4) See division of the subject, ante 633. Beawes Lex Mer. 6 ed. vol. 2. 62.

(5) 2 Anders. Hist. Com. 276. A. D. 1619.

(7) A. D. 1631. 2 Anders. 346.

third exclusive African or Guinea company was incorporated in the year 1662, with his Royal Highness the Duke of York at the head, besides other persons of rank and distinction (1). In 1672, the fourth and last exclusive African company was erected, the third having surrendered its charter. The King and the Duke of York subscribed to the fourth company, as well as many persons of rank and quality, and the whole capital of £111,000 was completed in nine months. But though the trade of this company was at one time in an improving state, the company does not appear to have long had the exclusive enjoyment of it; and at the revolution, the West India planters, who had been in the habit of purchasing slaves from the company, joined the interlopers in asserting that they were always best served when the trade was open to all (2). In 1709, a committee of the House of Commons came to a resolution that, as the African trade was more especially necessary for the American plantations, it ought to be free to all her majesty's subjects in a regulated but not an exclusive company. But though a bill was brought into the House of Commons for this purpose, it met with so many objections that it was abandoned (3). The African company afterwards petitioned the house for leave to bring in a bill for the confirmation of their exclusive charter. But the petitions from private traders, as well as from the American colonies, for laying the trade quite open, effectually opposed the company's petition (4). A new regulated company was at length established by the statute 23 Geo. 2, c. 31., the preamble of which sets forth the advantages of the African trade to Great Britain in supplying her colonies with negroes. The trade to Africa was made free by the first section of the statute, which provides, that it shall be lawful for all his majesty's subjects to trade to any place in Africa between the port of Sallee in South Barbary and the Cape of Good Hope, without any restraint, except as therein expressed. The statute proceeds to enact, that all his majesty's subjects who shall trade with Africa between Cape Blanco and the Cape of Good Hope, shall be deemed a body corporate and politic, by the name of the *Company of Mer-*

7thly, The African Company.

(1) 2 Anders. Hist. Com. 473, A. D. 1662.

(2) 2 Anders. Hist. Com. 526. A. D. 1672, where it is said that it became open at the revolution; and the bill of rights, 1 W. & M. had effectually made exclusive charters not authorized by act of parliament illegal. In 1673 the company coined guineas, which were first known at this time, id. ibid.

(3) 3 Anders. 34. A. D. 1709.

(4) 3 Anders. 42. A. D. 1711. See also 3 Anders. 47. A. D. 1712. id. 55. 30th April 1713.; id. 134. A. D. 1722.; and see id. 144. 162. 196. 266.

7thly, The African Company.

chants trading to Africa, with perpetual succession and a common seal; and that all the British forts, settlements, and factories on the coast of Africa from Cape Blanco to the Cape of Good Hope, and all places within those limits which were then claimed by or in the possession of the Royal African company of England, should, after the passing of an act for divesting the African company of their charter, forts, castles, and military stores, canoemen, castle slaves, and other property on the coast of Africa (their merchandize only excepted), be absolutely vested in the new company and their successors, to the intent that the said forts, settlements, and premises should be employed at all times thereafter only for the protection, encouragement, and defence of the said trade. But the company established by the act (23 Geo. 2. c. 31.) were not allowed to trade with Africa in their corporate or joint capacity, nor to have any joint or transferrable stock, nor to take up money on their common seal (1). The forts and warehouses of the company were to be free at all times to all his majesty's subjects, to be used as warehouses for depositing gunpowder, gold, elephant's teeth, wax, gums, and drugs, and no other goods; and also free and open in case of necessity or danger to all his majesty's subjects, for the safety of their persons and effects (2). Three masters of the court of chancery, of whom the accountant general was to be one, were appointed commissioners for examining and allowing the claims of the Royal African company, after which proceeding that company was to be dissolved (3). So the African trade again assumed a new appearance, after having passed through many different constitutions. The trade having been thus opened in a regulated company by the statute 23 Geo. 2., it became necessary that a compensation should be made to the old Royal African company for their charter, lands, forts, slaves, stores, and other effects. An act was therefore passed in the 25th year of George the 2d, for applying a sum of money to those purposes, and for vesting the property in the new company of merchants trading to Africa. The Royal African company was absolutely divested, from the 10th April 1752, of their charter, and of all their lands, forts, and property, beginning at the port of Sallee, and extending from thence southward to the Cape of Good Hope, together with all their cannon, canoemen, slaves, rights, and evidences. This act empowered the new company, with the consent of the Board of Trade and Plantations, to arm and train military forces at their forts, to inflict punishment, so that it did

(1) 23 Geo. 2. c. 31. s. 1, 2, 3, 4. 3 Anders. 279.

(2) 23 Geo. 2. c. 31. s. 26, 27.

(3) 23 Geo. 2. c. 31. s. 32.

not extend to life or limb, and to erect courts of judicature for mercantile and maritime bargains (1). The last act of parliament was the statute 23 Geo. 3. c. 65. which was passed to vest James Fort in the river Gambia and its dependencies, and all other British forts and settlements between Sallee and Cape Rouge, in the company of merchants trading to Africa; the trade still remaining free, and subject to the same regulations as are contained in the statute 23 Geo. 2. c. 31. The trade in slaves formerly constituted a principal branch of the commerce carried on with Africa; but it has been made illegal in the present reign, and severe penalties were imposed on those concerned in it by the statute 47 Geo. 3. sess. 1. c. 36. The provisions of this act, however, were found insufficient, and the slave trade still continued to be carried on, on the coast of Africa and in other places. The statute 51 Geo. 3. c. 23. was afterwards passed, which makes it felony for any subject of the realm, or a person being within any of his majesty's territories, to be concerned in the slave trade after the 1st June 1811; the punishment being either transportation for a term not exceeding 14 years, or confinement and hard labour for a term not exceeding five years nor less than three, at the discretion of the court before which the offender should be convicted. (2)

7thly, The African Company.

The Sierra Leone company was abolished by ne statute 47 Geo. 3. sess. 2. c. 44. The letters patent and grants of the 5th July 1801 were then declared to be null and void, and the company was divested of the peninsula of Sierra Leone, and all forts, castles, buildings, or estates that had been purchased or acquired by the company; and this district, as well as all the forts, castles, buildings, and estate of the company, were vested in his majesty for ever. At the expiration of seven years from the passing of the 47 Geo. 3. it was enacted, that the company should cease to be a body politic and corporate to all purposes whatever. (4)

8thly, The Sierra Leone Company. (3)

The Russia company was first incorporated by a charter of Philip and Mary, bearing date the 6th of February in the first

9thly, The Russia Company. (5)

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(1) 25 Geo. 2. c. 40. s. 1. 6. 3 Anders. 287.

(2) 51 Geo. 3. c. 23. and see Cooke v. Maxwell, 2 Stark. 183. and 55 Geo. 3. c. 172.; and see before these acts Jones v. Schmoll, 1 T. R. 130. note a. 39 Geo. 3. c. 80. s. 24, 25. 34 Geo. 3. c. 80. s. 10.

(3) See division of the subject, ante 633. Beawes Lex Mer. 6 ed. vol. 2. 174, 175. Adolphus, Pol. Stat. British Empire, vol. 4. 626.

(4) 47 Geo. 3. sess. 2. c. 44. s. 1, 2.

(5) See division of the subject

9thly, The Russia Company.

and second year of their reign. The charter was granted to them under the style of "the merchants adventurers of England for the discovery of lands, territories, isles, dominions, and seignories unknown," and not before their late adventure or enterprize by seas or navigation commonly frequented (1). This company was first sanctioned by act of parliament in the 8th year of the reign of Queen Elizabeth (2). The statute provides that the company shall be incorporated by the name of The Fellowship of English Merchants for Discovery of New Trades, and that no part of the continent, isles, ports, or arms of the sea of any sovereign not known or frequented before the company's first enterprize by subjects of this realm, and lying northward, north-westward, or north-eastward, nor any parts then subject to the czar of Russia, nor the countries of Armenia, Media, Hyrcania, Persia, or the Caspian Sea, nor any part of them, shall be traded to nor frequented by any subject of England, without the order or consent of the governor, consuls, and assistants of the fellowship, or the greater part of them, on pain of forfeiting ship and goods, one-half to the queen and the other half to the company. But it was provided that it should be lawful for any subject of the realm to sail to the port or castle of Wardhouse, or to any of the coasts of Norway, for the trade in fishing, or any other trade there used by English subjects. This statute of Queen Elizabeth was the first that established an exclusive mercantile corporation (3). A statute of William III. enacts that every subject of this realm desiring admission into the fellowship of English merchants for discovery of new trades, commonly known by the name of the Russia company, on request made to the governor, consuls, and assistants of the fellowship, shall be admitted on paying only £5 (4). Some privileges in respect of trade were conferred on this company (5) by the statutes 14 Geo. 2. c. 36. and 23 Geo. 2. c. 34.; the statute 14 Geo. 2. made it lawful for any person free of the Russia company to import, exclusively of other persons, into this kingdom, in British-built

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ante 633. See Adolphus, Pol. St. British Empire, vol. 3. 226. Beawes Lex. Mer. 6 ed. vol. 2. 110, 111.

(1) 2 Anders. 98. anno 1554, where the charter is fully stated, Reeves 2d ed. 162. See also Jac. Dic. tit. Muscovy Company, where it is said to have been established by a charter of Ed. 6., but the charter was not granted till the next reign.

(2) Private act not printed in the statute book, but may be found at large in 1st vol. Hakluyt's Voyages, 1st ed. 1598, p. 369. 2 Anders. Hist. Com. 123. anno 1566. Reeves, 2 ed. 162. Preamble to stat. 10 & 11 W. 3. c. 6. 1 Holt. C. N. P. 105.

(3) 2 Anders. 125.

(4) 10 & 11 W. 3. c. 6. s. 1. 4.

(5) 3 Anders. 230.

shipping, from any place belonging to the Emperor of Russia, raw silk or any other goods of the produce of Persia, on observing certain regulations. The statute 23 Geo. 2. c. 34. s. 1. made some other conditions necessary on the importation of raw silk by the Russia company; but neither of the statutes was intended to encroach on the privileges of the East India company, nor to legalize the using or wearing of the wrought silks of Persia as prohibited by the statute 11 & 12 W. 3. c. 10. (1) A contract for the sale of Petersburgh hemp, imported by the vendor, in contravention of the privileges of the Russia Company, cannot it seems be recovered upon by him in an action against the purchaser, who did not participate in the illegality. (2) 9thly, The Russia Company.

The merchants of England obtained various charters from the crown at different periods, for regulating the trade to the east country; a name antiently given, as it is still continued, by mercantile people to the ports of the Baltic sea, more especially to those of Prussia and Livonia. Queen Elizabeth, in the year 1579, agreeably to the genius of that age, granted a charter in exclusion of all who should not take up their freedom in the new company, which was called the Fellowship of Eastland Merchants. Their privileges were the enjoyment of the sole trade through the Sound into Norway, Sweden, Poland, Lithuania, excepting Narva, (which was within the charter of the Russia company) Prussia, and also Pomerania, from the river Oder eastward, Dantzick, Elbing, and Koningsberg, also to Copenhagen and Elsinore, and to Finland, Gothland, Bornholm, and Ocland. The Eastland was a regulated company, that is, it did not trade with a joint stock, but the capital of each member was employed on his own account. Another charter in confirmation of this company was granted by king Charles the first in the year 1629 (4). The privileges of the Eastland company were at length curtailed by legal authority in the year 1672, when it was enacted, for the encouragement of the Eastland trade, that all persons, natives or foreigners, should from the 1st of May 1673 have free liberty to trade into Sweden, Denmark, and Norway, 10thly, The Eastland Company. (3)

(1) See other regulations, Pope, 60, 61, 62. and Anderson's Hist. of Commerce, index, tit. Russia Company.

(2) Gross v. La Page, 1 Holt. C. N. P. 105. Per Dallas, J. the goods are liable to be seized. Quere, tamen vide Catlin v. Bell, 4 Campb. 183. Johnson v. Hudson, 11 East. 180.

(3) See division of this subject ante 633. Adolphus, Pol. St. British Empire, vol. 3. 238. Beawes Lex Mer. 6 ed. vol. 2. 118.

(4) 2 Anders, 148, 149. Reeves 2 ed. 162.

10thly, The Eastland Company.

notwithstanding the charter of the Eastland company. It was also provided, that if any subject of this realm should desire to be admitted into the Eastland company, he should be entitled to his admission on paying 40s (1). Thus the Eastland company subsisted only in name, for all the north side of the Baltic sea was laid open, and the freedom for trading to the south side was reduced to the sum of 40s. (2)

11thly, The Turkey Company. (3)

In the reign of queen Elizabeth, an exclusive charter was granted to several eminent merchants for carrying on trade to Turkey. The exclusive trade was only granted for seven years, with a power of revocation on giving one year's notice; but a clause was inserted, providing for a further term of seven years, if the grantees should desire it, at the end of the first seven (4). In the year 1593, the same queen granted a second patent for a trade to Turkey or the Levant. The former grant having been made for seven years from 1581, must have expired in 1588, but it does not appear to have been renewed till 1593, when 53 persons, consisting of several knights, aldermen, and merchants, had the queen's letters patent for 12 years (5). After the expiration of this charter, a more effectual encouragement was given to the Turkey trade by a charter of James the first, which was not limited in its duration (6). The new company was incorporated by the name of the Governor and Company of the Merchants of England trading to the Levant Seas (7). It is what is called in England a regulated company, there being as yet no joint stock companies existing; every member trading on his own account, though subject to such regulations, as to the times of shipping or lading, as may be settled at their general courts. A statute of George the second has provided that every subject of Great Britain desiring to be admitted into the Turkey company, shall be admitted, on request to the governor or deputy governor, on payment of £20 (8). Every person who is free of the company may export goods from Great Britain to a place within the limits of the letters patent, in British or plantation-built ships, navigated according to law, so long as such person shall remain under the direction of the British ambas-

(1) 25 Car. 2. c. 7. s. 5, 6.

(2) 2 Anders. 522.

(3) See division of the subject, ante 633, Adolphus, Pol. St. British Empire, vol. 3. 231. Beawes Lex Mer. 6 ed. vol. 2. 57, 58. where see the regulations fully stated.

(4) 2 Anders. 153. A. D. 1581.

(5) 2 Anders. 181.

(6) A. D. 1605. 2 Anders. 225.

(7) 26 G. 2. c. 18. Pope tit. 78.

(8) 26 G. 2. c. 18. s. 1.; and see the oath on admission, s. 2.

sador and consuls, and may also import raw silk or other goods purchased within the limits of the company's charter. But the exportation of gold and silver, either in foreign coin or bullion, is to remain subject to the by-laws of the company (1). A mode is prescribed for admitting persons resident abroad into the company (2). The statute 59 Geo. 3. c. 110. enacts, that all goods, to whomsoever they may belong, of the growth or production of Turkey or Egypt, or of any of the dominions of the Grand Seignior, imported into the United Kingdom directly from Turkey or Egypt, or from any of the dominions of the Grand Seignior, or from any other place, shall be subject to the duties payable to the Turkey company under the acts of parliament therein contained (3). The navigation act provides with respect to the trade to Turkey, that no currants nor commodities of the growth or production of the territories belonging to the Ottoman or Turkish empire, shall be imported into England or Ireland in any vessel but such as is of English-built and duly navigated, and in no other, except only in such foreign vessels as are of the built of the place where the goods were produced, or of the port where the goods can only be or most usually are first shipped for transportation, and whereof the master and three-fourths of the mariners at least are of that place, under the penalty of forfeiture of ship and goods (4). Raw silk or mohair yarn of the product and manufacture of Asia, which has been shipped in the Streights or Levant Seas within the dominions of the Grand Seignior, and is afterwards landed at Malta, Ancona, Venice, Messina, Leghorn, Genoa, and Marseilles, for the purpose of being opened and aired, when reshipped on board the vessel from which it was landed, will be deemed to have been imported from the place within the Seignior's dominions where the goods were first shipped, and not from the place where they were landed to be opened and aired. (5)

11thly, The Turkey Company.

(1) 26 Geo. 2. c. 19. s. 4.
(2) 32 Geo. 3. c. 65. s. 1, 2.
(3) 59 Geo. 3. c. 110. s. 1.
(4) 12 Car. 2. c. 18. s. 8. see ante, 193, 4.
(5) 11 Geo. 3. c. 41. s. 4.

CHAP. XIII.

Of the Law and Practice relating to the Duties of Customs and Excise, &c.

HAVING now concluded our inquiry into the various modes adopted by the legislature for the encouragement and restraint of importation and exportation, we will proceed in the present chapter to consider *the charges imposed on trade* as a source of revenue to the state.

Customs and Excise Duties defined, and the relative Advantages of each.

The duties which operate as a direct charge on trade, and which it is therefore now proposed to consider, are those of the *customs* and the *excise*. The *customs* are duties payable on merchandize brought into or carried out of the country, or on goods carried coastwise. The *excise* duties, on the other hand, are an *inland* imposition, and are imposed sometimes on the *consumption* of the commodity, but more frequently on the retail *sale*, which is the last stage before consumption. The custom duties, which are paid on the first introduction of goods into the country, are liable to objection on that account, as the merchant is obliged to charge in the price of the commodity, not only the tax itself, but also a commercial profit on such tax; and when the goods have to pass through the hands of various dealers, the accumulated profits on the tax very often exceed the amount of the tax itself (1). The duties of excise fall more lightly on the consumer than custom duties to the same amount, because they are generally paid in a much later stage. The expence of collecting them is also easier. But the frauds to which this branch of the revenue is exposed, have occasioned it to be protected by provisions which some have considered too rigorous and inquisitorial for the temper of a free nation. The frauds that might be committed, unless a strict watch was kept, have made it necessary to give the excise officers a power to enter and search the houses of persons who

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(1) Tucker on Trade, 38. 124. But see the method of bonding and warehousing goods, which has in a great measure removed this objection, ante, 546.

deal in excisable commodities at any hour of the day, and, in many cases, of the night likewise: and the proceedings for a transgression against the law are so summary and expeditious, that a person may be convicted within a very short time in a penalty of many thousand pounds, by two commissioners or justices of the peace, to the total exclusion of the trial by jury and disregard of the common law. The regulations of the excise, however, are not without advantages ulterior to the production of revenue, inasmuch as they are the means of preserving some species of goods from adulteration, which might be highly prejudicial to the health of the community. The imposition of heavy duties on articles which may be called the necessaries of life, as on salt, leather, soap, and candles, or on manufactured goods, is liable to objection, on account of the influence of such a measure in depressing trade and industry: and the interest of the manufacturers seems also to require that the importation of foreign raw materials should be preserved, as much as possible, unencumbered with duty (1). The duties on *importation* constitute at the present day the principal branch of those that are levied under the name of *customs*, and the goods which are charged with duties on *exportation* are comparatively few. Formerly, indeed, duties were imposed on the exportation of almost every commodity, under an idea that such duties were not paid by the natives but by the foreign merchant; but this opinion is now exploded: experience has proved that foreign nations will not give beyond a certain price for any commodity whatever, and that by taxing goods exported we should either force them to give up the consumption, or to trade with other places for a supply (2). The duties on goods carried *coastwise* are imposed on only three commodities, namely, coals, slate, and stone. Indeed it is one of the principal advantages of the uniform system of taxation, which, with a few exceptions of no great consequence, takes place in all the different parts of the united kingdom, that it leaves the interior commerce of the country, the inland and coasting trade, almost entirely free. The inland trade is almost perfectly free; and the greater part of goods may be conveyed from one end of the kingdom to the other, without having occasion for a permit or licence, and without being subject to any question, visit, or examination

General Observations.

(1) See Tucker on Trade, 38. 2 Sinclair on the Revenue, 3 8 to 411. 3 Smith's W. of N. b. 5. c. 2. p. 347, &c. 1 Bla. Com. 313 to 320. Highmore on Excise, vol. 1. Preliminary Observ. on Revenue.

(2) 2 Sincl. 360. and see as to coals carried coastwise, 2 Sincl. 361. Smith's W. of N. b. 5. c. 2. Highmore on Excise, Introduction.

General Observations.

from the revenue officers. There are a few exceptions, but they are such as can give no interruption to any important branch of the inland commerce of the country. Goods carried coastwise indeed in general require certificates or coast cockets (1). But except coals, slate, and stone, such goods are in general duty free. This freedom of interior commerce, which is the effect of the uniformity of the system of taxation, is highly important in its influence on the prosperity of the kingdom, as every great country is necessarily the best and most extensive market for the greater part of the productions of its own industry. (2)

1. Customs. Division of the subject.

The law relating to the *customs* may be considered in the following order; viz. *First*, the history of the customs, and the mode in which they were anciently levied. *Secondly*, the consolidation acts, and the mode in which this part of the revenue is now collected—(and herein, 1st, of the duties on importation; 2dly, on exportation; 3dly, on goods carried coastwise; 4thly, of the dock dues; 5thly, the South Sea duties; 6thly, the quarantine duties; 7thly, the duties of tonnage; 8thly, the countervailing duties charged on the trade between Great Britain and Ireland). *Thirdly*, the regulations prescribed by law to secure the payment of the duties—(and herein, 1st, of the ports and places at which a vessel may lawfully receive or discharge her cargo; 2dly, the time assigned for the discharge or loading; 3dly, of the manifest; 4thly, of the master's report and the entry made by the merchant,—of the valuation of the goods,—the bill of sight,—the allowances for tare, damage, &c.; 5thly, of the cocket or clearance; 6thly, of the warrant for landing or shipping the goods and the presence of the officer; 7thly, the regulations on carrying goods coastwise). *Fourthly*, the penalties and forfeitures consequent on trading in prohibited and uncustomed goods; the powers of searching for and seizing such goods; the method of procuring restoration to be made; the immunities and protection afforded to the officers, and the liability which they incur.

1st, Concise History of the Customs, and what were anciently payable.

The customs, or charges in the nature of customs, have been imposed in Great Britain from the earliest times. When the country was under the Roman government, heavy duties were imposed on goods imported and exported; and indeed, as the

(1) As to the necessity for these, see post.

(2) Smith's W. of N. b. 4. c. 5. 2 Sincl. 361.

First, History and Ancient Duties.

chief aim of these warlike conquerors was to obtain a large revenue from the nations that became subject to their dominion, it was not likely that so obvious a method of raising money should be passed over or neglected (1). Afterwards the Saxon monarch Ethelred the second, among the laws made by the consent of the assemblage at Wantage in Berkshire, established duties on ships and merchandize, to be paid at Billingsgate in the port of London, according to the following rates; every boat arriving at Billingsgate paid for toll or custom, one halfpenny; a larger boat with sails, a penny; a keel or hulk, which was a vessel of a larger size, four-pence; a vessel with wood, one piece of wood; a boat with fish coming to the bridge, one halfpenny or one penny, according to her size (2). The customs therefore appear to have existed before the conquest, and they are said to have been at first small sums paid by the merchant for the use of the king's warehouses, weights, and measures (3). Duties of this nature on merchandize exported and imported have been considered by some authorities as the ancient inheritance of the crown which might be levied by the king's prerogative, without the aid of an act of parliament. (4) The considerations in respect of which this tribute was paid to his majesty, are said to have been the permission which he gave to his own subjects to travel out of the realm with their merchandize, or to foreign traders to bring goods into the kingdom; the dominion of his majesty over the sea, as well as his power as guardian of the ports and havens of the realm; and the protection which he afforded to the merchant against the attacks of enemies and pirates (5). The provisions of magna charta have been also cited to show that custom duties existed at the time of passing that act, and had been formerly exacted. The 30th chapter provides, that all merchants, if they were not openly prohibited before; shall have safe and secure conduct to depart out of England, to come into England, to tarry in and go through England, ad emendum & vendendum, sine

(1) Sinclair on Rev. vol. 1. 16. Colquhoun's Brit. Emp. 130.

(2) 1 Anders. Hist. Com. 98. 1 Macphers. Ann. 277.

(3) 1 Sinclair, 45. Gilb. Exch. 214. 2 Hume, 177.

(4) Dyer, 43 b. (24)—92 a. (17)—165 b. (5) Sir John Davies Reports in Ireland, 8, &c. Adm. Arquendo in Hampden's Case, 2 Rushw. 497, 498; but see Authorities infra. 2 Inst. 59. Foster's Law of Trade, 16. Com. Dig. Trade, C.—Parliament H. 9, 11. &c. Prerogative, D. 43. 6 Bac. Abr. tit. Smuggling, B. C.

(5) Davies, 9 b. Dyer, 43. pl. 24. Foster's Law of Trade, 161, 162. Bac. Abr. tit. Smuggling, A. 2 Beawes, 668. 3 Smith W. of N. 111, 115.

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omnibus toltis malis per antiquas & rectas consuetudines (1). What these ancient and rightful customs were is now unknown, but they must have been very inconsiderable, as they were let to farm in the fourth year of king John's reign for only 1000 marks (2). The institution of the customs as at present collected is referred, by Lord Coke, to the reign of Edward the first, when he says that the claim first arose by act of parliament. He observes that "although some have supposed that there was a custom due to the king by the common law from strangers as well as natives, called antiqua custuma, for wools, woolfels, and leather; that is to say, for every sack of wool containing 26 stone, and every stone 14lbs. 6s. 8d., and for a last of leather 13s. 4d., it is nevertheless certain, that those customs had their beginning by common consent, by act of parliament;" and he supports his opinion by a reference to letters patent of king Edward the first, wherein it was recited "cum *prælati magnates & tota communitas* quandam novam consuetudinem nobis & hæredibus nostris de lanis pellibus & coriis; viz. de sacco lanæ, 6s. 8d &c." (3) In commenting upon this patent, he observes that four things are to be remarked respecting it. 1st. That these customs had their creation by authority of parliament, and were not by the common law, as appears by these words, quandam *novam* consuetudinem. 2. That this new custom was granted to king Edward the first, as is proved by the word *nobis*. 3. That it was granted at the parliament holden 3 Edw. 1. commonly called Westm. 1. though the record of it cannot be found; for the patent bears date the 10th Nov. in the 3d year of Edw. 1., which was near the ending of that year, and the parliament was holden in the preceding Easter time. 4. That here *consuetudo* signifies a custom or subsidy granted by the common consent of the nation in parliament, in which sense it is also used in the statute 51 Hen. 3. de scaccario (4). The opinion of Lord Coke as to the origin of the custom duties is adopted by Mr. Justice Blackstone, and by other legal authorities, but it has not been universally admitted. Lord Chief Baron Gilbert accounts for their institution in a different manner. He says, that in the reign of Edward the first,

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(1) 9 Hen. 3. c. 30. 2 Inst. 58.

(2) 1 Sincl. 100. In the reign of Henry III. they were increased to £6,000 per ann. 2 Hume, 170. note C. Noy's Rights of the Crown, 78. 1 Sincl. 104.

(3) See 1 Vaughan 162; where the recital is said to be communitas mercatorum regni nostri; and in other respects differs a little from that in 2 Inst.

(4) 2 Inst. 59. 1 Bla. Com. 314. Vaughan, 161, 162.

houses were erected in every port for keeping wares and merchandize imported and exported; and there was a particular sum paid for the *custodium*, which was called the customs, and from whence he took the word to be derived. "For, he says, when Edward the first, Richard the first, or whatever other king first erected those houses, and appointed particular sorts of payments, they could not, he says, be called customary or usual payments, for it is a solecism in language to say they were customary, or usually paid, when they first began. The subjects bore these payments very well upon their wool, woolfels, and leather, from the convenience that arose from the custom-houses, which formed a place of deposit for the goods, where the merchant might come to view them, and where they were sure of a market: there were also at these places a beam, scales and weights, for ascertaining the quantity; packers, for seeing that the fair quantity of wool and leather was contained in each parcel; and gaugers, to ascertain the quantity of wine in each hogshead of the foreign merchant. These regulations are said to have introduced great fairness in the transactions of trade, and drew a great confluence of merchants to all our ports. So that Lord Ch. B. Gilbert was not of the same opinion with Lord Coke, that these customs began by a general law, but that they had their origin in the manner just mentioned; that is, that the king erected his custom-house into a public market, whither all merchants were to come to buy the merchandize of our country, and to sell their own; and the payment of the customs was in the nature of a toll for the admission of the goods into the warehouse. He says, therefore, that there is no room to suppose that the customs began by an act of parliament which is lost, which he describes as the common refuge of lawyers when they cannot find the original of things (1). Upon the whole, it seems probable that the customs were at first only small duties levied at ferries and bridges, and perhaps for the liberty of trafficking on the Thames, together with fees for weighing and warehousing goods, which the officers of the crown exacted for their labour and attendance (2). These trifling exactions might gradually take place without the sanction of parliament, in consequence of the king, (who was accounted the arbiter of commerce) having provided weights and beams, and erected warehouses, where, subject to certain customary fees and duties, all goods and commodities

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(1) Gilb. Exch. ch. 15. p. 216, &c.

(2) 1 Anders. Hist. Com. 98. 1 Macphers. 277. Gilb. Exch. 216. 1 Sincl. Rev.

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might be sold. But king Edward was not satisfied with these petty advantages, for having seen, during the course of his expedition to Palestine, with what facility considerable sums of money were levied by way of custom in foreign countries, he thought it would be a happy expedient for raising a revenue in his own kingdom. The duties at first laid on, however, were very moderate, being those which we have already stated to have been granted to the king by act of parliament, namely, 6s. 8d. on every sack of wool exported, and the like sum for every 300 woolfels, and a mark or 13s. 4d. for every last of hides, at the rate of 12 dozen per last. These customs, it is clear, were granted by act of parliament (1); but though some have considered that the payment of customs owes its origin to this act, because they are called in it quædam *nova* custuma, yet the only inference that can be justly drawn from that expression seems to be, that the quantum of the customs was new, and that some duty was paid before, which was the old one, in opposition to the new one then granted (2). The necessities of King Edward, however, were afterwards found to demand a more productive revenue, and he began with additional duties on aliens or foreign merchants, probably under the idea that any taxes which they were inclined to pay might afterwards be extended with less difficulty to his own subjects; he granted, therefore, a charter, denominated charta mercatoria, to the merchant strangers settled in England, by which certain valuable privileges were bestowed upon them, in consideration of their having agreed to pay the following customs; namely, 1st. *Prisage,* which had been formerly paid in kind, by the king's taking two tons of wine from every ship, English or foreign, importing into England 20 tons or more, one before and one behind the mast, and was now commuted to the sum of two shillings for every ton of wine imported, over and above the ancient customs, a tax which afterwards obtained the name of *butlerage*, from being paid to the king's butler. 2dly. Forty-pence for every sack of wool and for every 300 woolfels exported, in addition to the half-mark or 6s. 8d. paid by the natives, together with an additional 6s. 8d. for every last of hides. 3dly. Some other duties upon cloth and wax, besides a general poundage or tax of 3d. in the pound on all goods imported, or foreign commodities re-exported after having been landed in England, exclusively of the ancient customs to

(1) Gilb. Exch. 276.

(2) Foster's Law of Trade, 16. It appears from the red book in the exchequer, that customs were paid before 3 Edw. I. on wools and leather. Foster, 15

which they were formerly subject (1). These rates were called *nova custuma*, and sometimes *alien duties*, and were levied by the authority of the crown, without the sanction of parliament, on the ground of the voluntary consent that had been given by the foreign merchants (2). In the third year of Edward the second, however, this charter was suspended, and it was totally repealed in the 5th year of the same king by the lords, who were at that time entrusted with the government of the country, but it was again established in the reign of Edward the third; and, in fact, it is the foundation of the duties of tonnage and poundage, so famous in the history of England (3). These new customs, being founded on an agreement between the king and the foreign merchants, the legality of which the commons were much disposed to question, did not affect the native traders. The right of adding to the old, or of levying new customs, became at length a matter of great public importance, and was for many years warmly contested between the crown and the people: but two statutes were passed in the reign of Edward the third and Richard the second, enacting, in conformity with what appears to have been the common law, that no imposition should be laid on wool, woolfels, and leather, which were the three staple commodities of the realm, without the consent of parliament (4). The better opinion seems to be, that the legal right of the crown to demand such payments as can in propriety be called customs, originated in an act of parliament; and though similar duties were certainly exacted in the reigns of Queen Mary and Queen Elizabeth, of James 1st and Charles 1st, without the consent of parliament, yet they were never quietly submitted to, and cannot be considered as resting on any legal foundation. The statute 1 W. & M. sess. 2. c. 2. usually called the bill of rights, has effectually put an end to the exercise of any such power on the part of the crown. (5)

First, History and Ancient Duties.

The ancient customs may be divided into four branches: 1st. The *custuma antiqua sive magna*, to which we have already

Ancient Customs.

(1) This charter is set forth at length in Foster's Laws of Trade, 18. 1 Anders. Com. 268, 9. Anno 1302. 4 Inst. 29. 1 Bla. Com. 314. 1 Sinclair, 110.

(2) Gilb. Exch. 277. 4 Inst. 29.

(3) Foster on Trade, 26. 4 Inst. 29. and marg. Clau. Rot. Mem. 22. 3 Edw. 2. 5 Edw. 3. c. 1. 27 Edw. 3. c. 26. 12 Car. 2. Subsidy act. 1 Sincl. 111.

(4) 46 Edw. 3. c. 4. 11 Rich. 2. c. 9. Foster's Law of Trade, 16. Parl. Rot. 2 R. 2. n. 3, 4, 5. 2 Rushw. 520, &c. 6 Bac. Abr. tit. Smuggling, B.

(5) Id. ibid. Shepherd v. Gosnold, Vaughan, 161, 2, 3. 1 Sincl. 207. 259. and Record, 278—303. 1 W. & M. sess. 2. c. 2.

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alluded, were payable upon wool, sheep skins, or woolfels, and leather, exported out of England (1). They were payable by every merchant native, as well as stranger, with this difference, that the stranger paid a higher duty than that charged on an Englishman (2). When the woollen manufacture came to be established, the same customs were imposed on the exportation of woollen cloths, that the king might not lose any part of the duty on wool, by the exportation of the cloth (3). 2dly. The *custuma parva et nova*, which we have already described to be the duties to which merchant strangers became liable by the mercantile charter of Edward the First (4). The extraordinary duties paid by aliens, having been called at their introduction *parva custuma*, to distinguish them from the larger duties which were paid by English merchants as well as aliens, all extraordinary duties afterwards imposed upon alien traders were accounted for by the name of petty customs (5). But the statute 24 Geo. 3. sess. 2. c. 16. repealed the duty called the petty custom, imposed by the subsidy act of 12 Car. 2. c. 4., as well as all additional duties on the goods of aliens or strangers born, except those that were imposed on goods imported or exported in a foreign ship, and the duties of package and scavage, and except also those granted by charter to the city of London. So that the alien duties are now, in general, at an end (6). 3dly. The *prisage or butlerage* of wines, which has been also already adverted to. This was a right to take two tons of wine from every ship having twenty tons or more on board, one before the mast, the other behind it, paying twenty shillings for each ton. The charter of Edward the First commuted this right into a pecuniary duty of two shillings for every ton of wine imported by a merchant stranger; it was called butlerage, because the tribute of two shillings was paid to the king's butler. The prisage of wines is said to have been considerably older than the other custom duties, being taken notice of in the great roll of the exchequer of 8 Rich. 1. which is still extant (7). 4thly. The *tonnage and poundage*

Petty Customs or Alien Duties, and their Abolition.

Prisage and Butlerage Duties.

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(1) Vaughan, 162. 2 Inst. 59. 1 Bla. Com. 315. Bac. Ab. Smuggling, C. 1. Davies, 8. 4 Inst. 29. Com. Dig. Parliament, H. 9. H. 11. the exportation is now prohibited, ante, 573.

(2) 2 Inst. 59. 4 id. 29. Foster 15. 1 Bla. Com. 315. Dav. 86.

(3) 4 Inst. 30. Smith, b. 5. c. 2. 6 Bac. Ab. Smuggling, C. where see the history of this imposition.

(4) 4 Inst. 29. Davies, 8 b. Com. Dig. Parliament, H. 11. Bac. Ab. Smuggling, C. 1. C. 2. C. 3.

(5) Bac. Ab. title Smuggling.

(6) Ante, 160, 1.

(7) The history of this duty is to be found in Bac. Abr. tit. Smuggling, C. 2. D. 1. D. 3. and the cases there cited, 2 Inst. 59. 4 Inst. 30. Gilb. Exch. 205 to

duties were so called, as the expressions indicate, from the mode in which these rates were levied. The tonnage duty was a charge upon all wines imported over and above the prisage and butlerage. Poundage was a duty imposed ad valorem, at the rate of twelve pence in the pound, on all other merchandize whatsoever (1). The duties of tonnage and poundage were generally granted to the king by the same act of parliament, and were called the subsidy of tonnage and poundage (2). The subsidy of poundage having continued for so long a time at one shilling in the pound, or at five per cent., a subsidy came, in the language of the customs, to denote a general duty of this kind of five per cent. This subsidy, which is called the old subsidy, continued to be levied until a very recent period, according to the book of rates established by the 12 Car. 2. c. 4. The new subsidy imposed by the 9 & 10 W. 3. c. 23. was an additional five per cent. upon the greater part of goods. The grant in this statute of a tonnage duty on the importation of wine, being silent as to prisage wine, the construction was, that prisage wine was chargeable with the duty, imposed by the act in general terms (3). Various other subsidies were afterwards granted by act of parliament. The tonnage and poundage subsidy imposed by the 2 Ann. c. 9. was called the one-third subsidy; that imposed by the 3 Ann. c. 5. was called the two-thirds subsidy. The tonnage subsidy imposed by the 18 Geo. 2. c. 9. was called the subsidy of 1744. The poundage subsidy imposed by the 21 Geo. 2. c. 1. was called the subsidy of 1747. (4)

First, History and Ancient Duties.

The enumeration of duties in the subsidy act, 12 Car. 2. c. 4. was called a *book of rates*. The 6th section of that statute declares, that no rates can be imposed on merchandize imported or exported by subjects or aliens, but by common consent in parliament, and proceeds to enact that " the rates which are to be paid shall be those mentioned and expressed in a book of rates annexed to the act, intituled the rates of merchandize, that is to say, the subsidy of tonnage, the subsidy of poundage, and the subsidy of woollen cloths, or old draperies, which are to be

Book of Rates.

211, 2. 1 Mad. Excheq. 525, 6. to 530. 1 Bla. Com. 315. 1 Anders. Com. 269. 1 Macphers. 470. and see post.

(1) Bla Com. 315. Dav. 11, 12. 4 Inst 32. 2 Inst. 59, 60. 6 Bac. Abr. Smuggling, C. D. 4 Inst. 32.

(2) That is, since the 6 Rich. 2. n. 13. 6 Bac. Abr. Smuggling, C. D 4 Inst. 32.

(3) Paul v. Shaw, Salk. 617. Parker, 209. Paul v. Cooks, 6 Bac. Abr. Smuggling, D. 1.

(4) 6 Bac. Abr. Smuggling, D. 1.

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paid during the king's life, as they are rated and agreed upon by the commons house of parliament set down and expressed in this book, subscribed with the hand of Sir Harbottle Grimston, baronet, which book of rates composed and agreed upon by the commons, and every article, rule, and clause therein contained, it was provided, should remain during the king's life as effectual to all intents and purposes as if it had been particularly included in the body of the act (1). An additional book of rates on goods usually imported, and not particularly rated in the former, with rules and orders, &c. was signed in the reign of George the First, by Spencer Compton, esquire, the speaker of the house of commons, and authorized by the statute 11 Geo. 1. c 7. (2) Besides the duties enumerated in these two books of rates, various others were also imposed from time to time, according to the varying necessities of the state, and the accumulation of these duties became at length a great embarrassment to commerce, as the merchant found considerable difficulty in ascertaining the amount for which he was liable to answer. The number of the articles on which duties were charged, was of itself a source of confusion, and the evil was increased by the carelessness with which new duties were continually accumulated on the old; a per-centage being occasionally added to the original tax, while at other times the commodity was estimated by a new standard, either of bulk, weight, number, or value, and charged with an additional impost, without any reference to the duties formerly imposed. The growing confusion was still farther augmented by the special appropriation of each of these duties, and by the consequent necessity of a separate calculation for each, and this intricacy necessarily gave rise to much delay and to a certain loss of revenue, in consequence of the abuses which such confusion tended to encourage. (3)

Secondly, The Consolidation Acts (4) and existing Custom Duties.

These inconveniences were first remedied by the statute called the *customs consolidation act* (5), introduced by Mr. Pitt, in the year 1787. The method adopted by that minister to simplify the collection of the customs, was to abolish all the duties then subsisting, and to substitute in their stead one single duty on each article, amounting as nearly as possible to the

(1) 12 Car. 2. c. 4. s. 6. 1 Bla. Com. 316.

(2) 11 Geo. 1. c. 7. 27 Geo. 3. c. 13. s. 16.

(3) 3 Smith W. of N. 367. &c. 4 id. 287. 1 Bla. Com. 316. Christian's Ed.

(4) See division of the subject, ante, 692.

(5) 27 Geo. 3. c. 13.

aggregate of all the various duties then payable; and when any duty consisted of a fractional sum, he proposed to charge the nearest integral number. The series of resolutions submitted to the house of commons for the purpose of carrying this measure into effect, amounted to upwards of 3000. A sytematic simplicity and uniformity was at the same time introduced into the custom-house accounts, by which a more distinct view has been since obtained, both of the total amount of this important branch of the revenue, and of the various sources from which it is derived. These beneficial regulations were the result of the laborious investigation and judicious remarks of the commissioners of public accounts, who in their 13th, 14th, and 15th reports had fully explained the constitution of this department, the duties of its several officers, and the mode of collecting the customs both in London and the out-ports. They also pointed out many other important regulations for the reduction of expence or the accommodation of merchants, most of which have been since carried into effect. The statute which was passed in consequence of these exertions was the 27 Geo. 3. c. 13.; it repealed all custom duties payable to his majesty by virtue of any acts of parliament then in force on importation or exportation, or the carrying of goods coastwise, together with the drawbacks allowed on exportation: but it was provided, that the act should not extend to repeal or alter the duties of package, scavage, baillage, or portage, or any other duties payable to the city of London, or to any other city or town corporate in Great Britain (1). New duties on exportation, importation, and the carrying of goods coastwise were substituted for those repealed, and were set down in alphabetical order in tables annexed to the act (2). Another consolidation of the customs was effected in the year 1803, by the statute 43 Geo. 3. c. 68. They were again consolidated in 1809, by the act 49 Geo. 3. c. 98; and a recent statute 59 Geo. 3. c. 52. has been passed for the same purpose. The present consolidation act, 59 Geo. 3. c. 52., repealed all the custom duties payable to his majesty by virtue of any act of parliament in force in Great Britain on or immediately before the 5th July 1819, upon goods imported or exported, or carried coastwise, as well as the tonnage duties imposed upon a vessel entering or clearing outwards or inwards,

Secondly, The Consolidation Acts and existing Duties.

(1) The act also excepted the prisage and butlerage of wine, as to which see ante, 696. and post, and the coal duty, ante and post, and the special privileges of persons and corporations.

(2) 27 Geo. 3. c. 13. s. 2.

Secondly, The Consolidation Acts and existing Duties.

and also all additional duties charged upon the product or amount of the several duties of customs, and also the drawbacks allowed upon exportation, and substituted other duties and drawbacks in lieu of those that were repealed (1). But the act did not repeal or alter the package, scavage, baillage, or portage duties, nor any other duties payable to the corporation of London or the lord mayor, or to any other city or town corporate in Great Britain; nor did it repeal any other special privilege or exemption to which any person or corporation in Great Britain was entitled at the time of passing the act; nor did it repeal or affect the dock duties payable according to the tonnage of vessels, by the 39 Geo. 3. c. 69.; nor the quarantine duties allowed by the 45 Geo. 3. c. 10.; nor the South Sea duties payable under the statute 55 Geo. 3. c. 57.; nor the countervailing duties charged by the act of union on the trade between Great Britain and Ireland (2). The 59 Geo. 3., like the former consolidation acts, contains alphabetical tables of the custom duties; which are in general to be paid to his majesty in ready money, without any discount, though the payment of some of the duties may be deferred under the regulations of the warehousing and bonding system The duties contained in the first table annexed to the act are those payable on goods imported into Great Britain from foreign parts (except goods of the growth, produce, or manufacture of any place within the limits of the charter of the East India company, and goods imported from the Cape of Good Hope and its dependencies); and the *drawbacks* allowed on the exportation of such goods are contained in the same table (3). The duties of customs and excise payable on the importation of goods of the growth, produce, or manufacture of any place within the limits of the charter granted to the East India company, and on goods imported from the settlement of the Cape of Good Hope and its dependencies, and the drawbacks to be allowed on the exportation of such goods, are contained in another table (4). The customs payable on the exportation of goods from Great Britain, which are comprised in a third table, are much fewer than the importation duties (5). Various bounties and drawbacks are also allowed upon certain British goods exported as merchandize, which have been already made the subject of consideration (6). The 59 Geo. 3. also contains, in another table, the customs payable on goods carried coastwise from one place to another within Great Britain, and the drawbacks to

(1) 59 Geo. 3. c. 52. s. 1. 6.
(2) 59 Geo. 3. c. 52. s. 2. to 5.
(3) 59 Geo. 3. c. 52. table A.
(4) 59 Geo. 3. c. 52. table B.
(5) 59 Geo. 3. c. 52. table C.
(6) Ante. Pope, tit. 250.

be allowed on the exportation thereof from Great Britain (1). The statute provides that foreign goods imported into Great Britain, and afterwards exported, shall be liable to duty on being again imported into this country (2). The duties granted by the act, and made payable according to the weight, tale, gauge, measure, or value of the goods, are chargeable pro rata upon any greater or less weight, number, quantity, or value than that specified in the statute (3). All regulations for remitting or allowing duties to be deducted on account of damage or otherwise, or for better securing the revenue of customs in Great Britain, or for regulating the importation or exportation of goods, or the carrying them coastwise from port to port in Great Britain, or the entering, landing, or shipping of goods, and all provisions relating thereto, contained in any act of parliament in force in Great Britain before the 5th July 1819, still remain in full force and effect, and are to be applied to the subject of the 59 Geo. 3., and for carrying the same into execution, except so far as they are expressly repealed or altered by the act (4). The 59 Geo. 3., and the tables annexed to that act, do not extend to legalize any importation or exportation contrary to an act in force in Great Britain on or immediately before the 5th July 1819, except so far as any express alteration or provision is made to that effect (5). Such of the duties and drawbacks of customs as arise in England are placed under the management of the commissioners of customs in England; and such as arise in Scotland are placed under the management of the commissioners of the same department in Scotland (6). The provisions for warehousing and bonding goods before the duty has been paid, are continued by the 59 Geo. 3., as they have been mentioned in a former part of this work, except where it is otherwise provided by the act; but the *new* duties are to be paid on taking the goods out of the warehouse, though they may have been imported and warehoused before the 5th of July 1819, except where it is otherwise especially provided. (7)

Secondly, The Consolidation Acts and existing Duties.

The *definition* given in a former chapter of the terms importation and exportation is also applicable to this subject (8). In addition to what has been already stated, it is only necessary

Meaning of the Terms "Importation and Exportation."

(1) 59 Geo. 3 c. 52 s. 6. & table D. annexed to the act.
(2) 59 Geo. 3. c. 52. s 20
(3) 59 Geo 3. c. 52. s. 28.
(4) 59 Geo. 3. c. 52. s. 33. See the principle of construction of such a clause in the King v. Justices of Surrey, 2 Term Rep. 510.
(5) 59 Geo. 3. c. 52. s 16.
(6) 59 Geo. 3. c. 52 s 7.
(7) 59 Geo. 3. c 52. s. 21. & 24.
(8) Ante, 245. 569.

Secondly, The Consolidation Acts and existing Duties.

to observe, that the carrying of goods coastwise is not deemed an exportation of them in the ordinary use of that term; the duties on exportation and on goods carried coastwise, being vested in his majesty, and regulated, by distinct provisions (1). It has also been determined that an exportation is not complete, so as to protect the cargo from duties newly imposed, until the vessel has proceeded out of the limits of the port, although she is not only freighted and afloat, but has gone through all the formalities of clearing at the custom-house, and has paid the duties which were demandable at the time of her so doing. A new impost charged on exportation attaches while the goods are waterborne within any part of the port. (2)

The custom duties payable under the provisions of the consolidation act are, as we have already seen, of four descriptions: namely, the duties on *importation*, the duties on *exportation*, the duties on goods carried *coastwise*, and the duties of *tonnage*. In considering the law relative to these duties, it is not deemed necessary to notice the *amount* of duty with which each sort of merchandize is charged; nor is it possible, consistently with the limits of this work, to state all the regulations that have been made from time to time for securing the payment of the duties on *particular* goods. Without entering into such a detail, the four divisions to which we have alluded may be conveniently treated of, by considering first, the general principles adopted by the legislature in imposing the duties; and secondly, those particular regulations which are principally of importance to persons engaged in trade. The discussion, therefore, of the duties on *importation* will be divided into two parts. First, we shall consider the general principles of policy which regulate the collection of them; and secondly, the particular provisions, and principally those contained in the 59 Geo. 3. c. 52. with regard to the duties on sugar, wine, wood, wool; the fishery duties, and those charged in respect of the trade with Newfoundland; wearing apparel and baggage; prize goods; and goods wrecked.

1st, Of the Importation Duties. (3)

1st. The *importation* duties are more numerous than those levied on exportation, and in order to restrain the introduction of goods

(1) Scotland v. Wilson, 5 Taunt. 533. and more fully, 1 Marsh. 204. and see Com. Dig. Trade, C 4. Parker, 269.

(2) Attorney General v. Pougett, 2 Price, 381. Sir Thomas Cooke v. the Attorney General, Parker, 266. Leaper v. Smith, Bunb. 79. Williams v. Marshall, 2 Marsh. Rep. 92. 6 Taunt. 390, 1. 12 Co. 18. Com. Dig. Trade, C 2. C 3.

(3) See the division of the subject, ante, 692.

of foreign manufacture, they are frequently larger in amount in respect of manufactured goods, than on such as are imported in a rude state (1): so they are frequently higher upon goods imported in a British-built ship, than upon such as are imported in a ship not British-built (2); and are also higher upon articles not imported directly from the place of their growth, than upon those which are imported directly from such place (3). The duties on some particular goods are only to continue for a limited period; as the duty on the importation of buck wheat, which is to remain in force until the 25th of March 1821, and no longer (4). So in regard to cotton wool:—the duty of 6s. 3d. payable by the late act, on every 100lb. of cotton wool, not being the produce of and directly imported from any British colony or plantation in America, will continue until the 5th July 1822. (5) The Importation Duties.

The duties on *sugar* are continued annually; those now payable on the importation of this commodity will remain in force until the 25th day of March 1820; and are also liable to be suspended, under the following provisions of the 59 Geo. 3.: The 14th section provides, that whenever it shall appear, by notices in the London Gazette, that the average price of brown or muscovado sugar of the British plantations, ascertained and taken in manner prescribed by law in Great Britain, for any period required by law, shall be below 49 shillings the cwt., then it shall be lawful for the commissioners of the treasury to suspend, until a new average shall be published in the said gazette, the payment of one shilling in the cwt., part of the duty on brown or muscovado sugar of the British plantations granted by the act; and the like sum of one shilling the cwt. (part of the duty of £2 per cwt.) on sugar of the growth or produce of any place within the limits of the charter of the East India company; and if such average price shall be below 48 shillings, then two shillings; and if below 47 shillings, then three shillings, of such duties respectively; and to continue such suspension from time to time, if the case shall so require, according to the averages published as aforesaid (6). The 15th section of the act has also introduced other regulations with regard to sugars the produce of any place within the limits of the East India company. This section provides, that when- Sugars.

(1) As feathers dressed, the £100 value £50, undressed £20.
(2) As alkali differs according as it is imported in a British-built ship or not.
(3) 59 Geo. 3. c. 52.
(4) 59 Geo. 3. c. 52. s. 11.
(5) 59 Geo. 3. c. 52. s. 12.
(6) 59 Geo. 3. c. 52. s. 14.

The Importation Duties.

ever it shall appear, by notices published in the London Gazette in manner directed by law, that the average price of brown or muscovado sugar of the British plantations, for any period required by law, shall exceed 60 shillings the cwt., then one shilling the cwt., part of the duty of two pounds the cwt. on East India sugar imposed by the act, shall be suspended, until a notice of a new average price of such brown or muscovado sugar shall be published in manner aforesaid: and if such average price shall exceed the sum of 61 shillings the cwt., then two shillings the cwt., part of the said duty on East India sugar, shall be so suspended; and in like manner, if such average price of such brown or muscovado sugar shall exceed 62 shillings the cwt., then three shillings; if it exceed 63 shillings the cwt, then four shillings; if it exceed 64 shillings the cwt., then five shillings; and if 65 shillings the cwt., then six shillings; if it shall exceed 66 shillings the cwt., then seven shillings; if it shall exceed 67 shillings the cwt., then eight shillings; if it shall exceed 68 shillings the cwt., then nine shillings; and if 69 shillings the cwt., then 10 shillings in the cwt., part of the said duty on East India sugar, shall be so suspended. (1)

Wines.

The prisage and butlerage duties, which we have already alluded to as anciently payable on the importation of *wine*, were expressly excepted from the operation of the consolidation acts of 1787 and 1803 (2). These duties continued to be holden under ancient grants from the crown, when the committee of finance made their report in the year 1797; but the committee strongly recommended that they should be re-vested in the crown for the public service, if the consent of the grantees could be obtained (3). This measure was accordingly carried into execution by the statutes 43 Geo. 3 c. 156. 46 Geo. 3. c. 79. and the consolidation act 49 Geo. 3. c. 98 (4). The 49th Geo. 3. enacted, that after the 5th July 1809, no wine of any sort should be admitted to entry for prisage either in the port of London or either of those ports in England where the right of prisage had been purchased by government; but that wine imported into London or either of those ports, should be subject to the duties of customs and no other, as in cases of regular importation (4). The butlerage duty, and the money formerly

(1) 59 Geo. 3. c. 52. s. 15. Pope, tit. 221.

(2) 27 Geo, 3. c. 13.

(3) 4th Report of Committee of Finance, p. 14. 43 Geo. 3. c. 156.

(4) 49 Geo. 3. c. 98. s. 33.

(5) 49 Geo. 3. c. 98. s. 35.

received by the Duke of Grafton under the denomination of composition, were abolished at the same time (1); and the duties now payable will be found in the table annexed to the 59 Geo. 3. c. 52. A new regulation was introduced by the late consolidation act with respect to the importation of wine, by which the former provisions that had been made for the security of the revenue were in some degree relaxed. After the 5th of July 1819, it was made lawful to import into Great Britain from the islands of Jersey, Guernsey, or Alderney, and also from Ireland, any wine whatever in bottles or flasks, as well for sale as for private use, in packages each of which shall contain at the least six dozen reputed quart bottles or flasks, on payment of the several duties, as well of customs as excise, payable on the importation of such wines into Great Britain; provided they shall be imported in British or Irish-built vessels, owned, navigated, and registered according to law, and in such manner and under the like regulations, and subject to the like penalties and forfeitures, as are provided and in force in regard to the importation of French wines in bottles or flasks imported into Great Britain. (2) The Importation Duties.

The late consolidation act also provides that *Santa Maria wood*, fit for naval purposes, shall be exempt from duty from the 5th July 1819 until the 25th March 1820, when imported into Great Britain from the Bay of Honduras in British-built vessels, owned, navigated, and registered according to law, provided it be regularly entered and landed under the care of the proper officers of customs (3). During the same period also, no duty is to be payable upon the importation into Great Britain of any *teake wood*, fit for naval purposes, of the growth or production of any British colony, plantation, territory, or possession in Africa; provided due entry be made thereof, and that such wood be landed in the presence of the proper officer at the port of importation. There are some special provisions in relation to the importation of this last mentioned wood from any port within the limits of the East India company, and they are contained in the act 34 Geo. 3. c. 56. Santa Maria Wood, and Teake Wood.

(1) 49 Geo. 3. c. 98. s. 36. The duties on wine will be found with the other duties in tables annexed to the 59 Geo. 3. c. 52.

(2) 59 Geo. 3. c. 52. s. 25. As to French wines in bottles from France. 42 Geo. 3. c. 44. s. 1. French wine in bottles from Guernsey, 39 & 40 Geo. 3. c. 83. See regulations, post, and Pope, tit. 188. See also as to wine from the East Indies, 59 Geo. 3. c. 52. s. 26.

(3) 59 Geo 3. c. 52. s. 18.

The Duties on Importation.

Wool.

The duty of 6s. 3d. payable by the 59 Geo. 3. c. 52. on every £100 of *cotton wool*, not being the produce of and directly imported from any British colony or plantation in America, will continue payable until the 5th July 1822, and no longer; and all cotton wool and waste of cotton wool being the produce of but not imported directly from any British colony or plantation in America, and all cotton wool and waste of cotton wool the produce of any other country or place, which shall be so imported on or before the 5th July 1820, shall be subject to certain duties imposed upon every 100lbs. as mentioned in the act; and all such cotton wool and waste of cotton wool which shall be so imported from 5th January 1820, shall be subject to certain other duties imposed upon every £100 value; provided that upon all cotton wool or waste of cotton wool that may be secured in warehouses at any time previous to the 5th of January 1820, the duty of 8s. 7d. for every 100 lbs. shall be paid at any time, as well after as before the 5th of January 1820, when such cotton wool shall be taken out of the warehouse for home consumption (1). A particular provision is also made with regard to *sheep's wool*, by the 59 Geo. 3. c. 52.; the 23d section of which act declares, that it shall be lawful for the commissioners of customs, with the consent and approbation of the treasury, upon proof to the satisfaction of the commissioners that orders were given for the purchase of any sheep's wool or lamb's wool, at any time before the 5th July 1819, and that such sheep's wool or lamb's wool shall be imported into Great Britain at any time after the 5th of July 1819, to admit such sheep's wool or lamb's wool to entry upon payment of the duty of 1d. per lb., and such sheep's wool or lamb's wool, so imported in pursuance of such orders, shall be subject to the duty of 1d. per lb. and no more, on being imported into Great Britain. (2)

Fish oil and Fisheries.

The *fisheries*, and the trade with the island of Newfoundland, are also regulated by particular provisions. No duty is payable on the importation of fish, under certain circumstances. Fish of every description, of British taking and curing, caught or taken in any part of the ocean, by the crews of any vessels built in Great Britain or Ireland, or the islands of Jersey, Guernsey, or Man, or in any of the colonies, plantations, islands, or terri-

(1) 59 Geo. 3. c. 52. s. 12. and see s. 22. that the new duties must be paid if cotton be taken out of the warehouse after 5th January 1820, though imported before that time.

(2) 59 Geo. 3. c. 52. s. 23.

The duties on Importation.

tories which now belong, or which did at the time of building such vessels belong, or which may hereafter belong to or be in the possession of his majesty, and wholly belonging to and owned by his majesty's subjects, and navigated and registered according to law, shall and may be imported into Great Britain in ships built, owned, navigated, and registered as aforesaid, without payment of any duty of customs whatever; provided, that before such fish shall be admitted to entry, the master of the vessel in which such fish shall be imported shall make oath before the collector or other chief officer of the customs at the port of importation, that such fish was actually caught, taken, and cured wholly by his majesty's subjects. Some peculiar provisions are also introduced by the late act with regard to the importation of *blubber*, train oil, spermaceti oil, head matter, and whale fins from Newfoundland. This statute provides (1) that before any blubber, train or spermaceti oil, head matter, or whale fins, the produce of fish or creatures living in the sea, imported into Great Britain as being taken and caught on the banks and shores of Newfoundland and parts adjacent, wholly by his majesty's subjects carrying on such fishery on that island, or as being taken and caught wholly by his majesty's subjects usually residing in any of the Bahama or Bermuda islands, or as being taken in the Gulph of St. Lawrence, or on the shores of any British colony in North America, or the parts adjacent, wholly by his majesty's subjects usually residing in any of the said colonies, and carrying on such fishery from thence, shall be admitted to entry on payment of the duty imposed by the act (2) on such blubber, train oil, spermaceti oil, head matter, or whale fins; the master of the vessel in which the same is imported shall produce and deliver to the collector or other chief officer of customs at the port of importation, a certificate under the hand and seal of the governor or deputy governor of Newfoundland, or of such other British colony, or of the collector or other chief officer of customs of the place in Newfoundland, or in such other British colony where such blubber, train oil, spermaceti oil, head matter, or whale fins shall have been taken on board; or if no such governor or deputy governor or collector or other chief officer of customs shall be residing there, then a certificate shall be produced under the hand and seal of the naval officer or other principal

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(1) 59 Geo. 3. c. 52. s. 38. and see 49 Geo. 3. c. 98. s. 37. and 43 Geo. 3. c. 68. s. 40. Pope, tit. 167.

(2) 59 Geo. 3. c. 52. s. 38. and table of import duties annexed.

The Importation Duties.

officer of such port, or of one of the justices of the peace for the district, testifying that oath had been made before him by the shipper of the blubber, oil, head matter, or whale fins, that the same was really and bonâ fide the produce of fish or creatures living in the sea, actually caught and taken by his majesty's subjects as above mentioned; and the master of the vessel in which the blubber or other goods are imported, shall make oath before the collector or other chief officer at the port of importation, that the blubber, &c. so imported is the same as that mentioned and referred to in the said certificate; and the importers or consignees of such blubber, &c. shall also make oath before such roper officer as aforesaid, at the time of entry, that, to the best of his knowledge, the blubber, &c. so imported was actually caught and taken by British subjects usually residing in such British colony, and carrying on such fishery from thence; and in default of the certificate being produced, and proof made on oath, the blubber, &c. shall be treated as the produce of foreign fishing, and shall be charged with duty accordingly. The payment of the duties imposed by the act on the importation of *train oil*, spermaceti oil, head matter, and whale fins, the produce of fish and creatures living in the sea, taken and caught on the banks of Newfoundland wholly by his majesty's subjects carrying on the fishery from that island; and also the duties payable on cranberries, fox skins, otter-skins, seal-skins, wolf-skins, bear-skins, cat-skins, beaver-skins, and on timber, being the produce of Newfoundland, and imported directly from thence, are suspended by the 39th section until 5th July 1824; and also the duty imposed by the act on goods exported from Great Britain to the island of Newfoundland; and also the tonnage duties payable on vessels entering inwards, or clearing outwards, from or to the island of Newfoundland, in any part of Great Britain, are in like manner suspended until the 5th July 1824, inclusively (1). The goods, however, must be duly entered and landed, and will be subject, in every respect, to all the regulations required by law; and the suspended duties will revive and become payable after the 5th July 1824, in the same manner as if no suspension had taken place. (1)

Wearing Apparel, &c.

The duties imposed by act of parliament upon goods, are not, in general, demandable upon *wearing apparel*, which cannot be considered as merchandize. This point seemed to have been

(1) 59 Geo. 3. c. 52. s. 39.

admitted on the part of the crown in the case of Chapman v. Lamb, when an action of trover was brought for the conversion of fourteen shirts, a night-gown and a cap; and a case was made for the opinion of the court. It was stated, that the plaintiff arrived at Dover from France, and brought the goods with him as his own wearing apparel, and not as merchandize or for sale, and that the defendant seized them for non-payment of duty. Upon the first argument, the court was strongly inclined in favour of the plaintiff, but a further argument was ordered. The attorney-general, however, on another day came into court and admitted that as it was particularly alleged that the goods were not imported as merchandize, it was too much for him to endeavour to support the seizure; but that if the case had rested only upon the assertion that the plaintiff did not bring them in for sale, he would have endeavoured to have supported it (1). The modern practice is also conformable to this decision. In a letter from the board of treasury, dated the 7th of June 1814, it is directed, for the accommodation of foreigners arriving in this kingdom, that all wearing apparel and baggage accompanying the proprietor, of whatever description, except East India articles, be delivered duty free; provided it appears on the examination of the officers, that the articles have been really worn, and were not made up for the purpose of being introduced into this country. Where the articles are not of the above description and are liable to duty, or where they are prohibited, the proprietors are to be allowed to leave them in the king's warehouses, under the care of the officers, for a period not exceeding six months, in order to give them an opportunity of taking them back without payment of duty. But the letter states that these regulations are to be confined to cases where there is no improper proceeding, or attempt to unship or land articles without the knowledge of the officers (2). So silk stockings, silk handkerchiefs, shoes, and gloves, when they accompany the proprietors arriving from abroad, and are evidently a part of their baggage, and have been worn and used, are not, according to a letter from the board of treasury, dated the 2d January 1817, to be seized by the officers of customs, provided such articles do not exceed what may be reasonably allowed, according to the rank of the party in whose ported through the agency of any person, but by the wind and

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(1) Chapman v. Lamb, 2 Stra. 943. 6 Bac. Abr. tit. Smuggling, D. 2. Dyson v. Lord Villers, Bac. Abr. Smuggling, F. 7. Com. Dig. Trade, C. 2.

(2) Letter from the Treasury, 7th June 1814. Pope, title 138.

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baggage the same may be found (1). So *British-built carriages* actually in use by passengers, as then travelling, are allowed to pass inwards and outwards without payment of duties, and without entries, under the restrictions respecting baggage (2). And *foreign watches and fowling pieces*, whether new or otherwise, are to be regularly entered and charged with the proper duties, although they be brought from abroad in the baggage of a passenger (3). The board of treasury has directed, by a letter dated the 10th Nov. 1817, that the baggage of persons arriving from the *East Indies* shall not be detained by the officers of customs, in consequence of its consisting of chintzes, calicoes, or any articles of that description, unless the quantity shall appear to be unreasonable, with reference to the rank of the party; but an order of the board of customs, dated the 14th Nov. 1817, directs that care shall be taken that the articles so delivered have been used and worn. (4)

Prize Goods.

On the construction of the statute 12 Car. 2. it was holden that ships taken as prize by a British man of war were, upon sale, liable to the ad valorem duty of five per cent. imposed by that act on goods and merchandize (5). But it was determined in the same case, that French-made sails belonging to a French ship so taken, were not chargeable with the additional duty of one shilling an ell by virtue of the 12 Ann. sess. 1. c. 16. and 19 Geo. 2. c. 27.; for the plain intention of these enactments was, that British ships should be furnished with British sails, and if they used foreign-made sails, that the additional duty should be paid for them. But it would have been absurd to extend these duties to the sails of foreign ships brought in by capture, which must be supposed to be furnished with sails of the manufacture of their own conntry (6). During the late war several regulations were made for the receipt and warehousing of prize goods, which it is not now considered necessary to detail. (7)

Wreck.

Goods thrown on shore from a ship that has been *wrecked* are not liable to duties, because it is said that they are not im-

(1) Letter from Treasury, 2d January 1817. Pope, 138.

(2) Letter from Treasury, dated 26th September 1817. Pope, 138.

(3) Order of Board of Customs, dated 3d December 1816. Pope, 138.

(4) Pope, tit. 91.

(5) Camplin v. Bullman, Parker 198. Bac. Ab. Smuggling, D. 2. Cro. El. 534. Com. Dig. Trade, C. 2.

(6) Camplin v. Bullman, Parker 198. Com. Dig. Trade, C. 2.

(7) 33 Geo. 3. c. 34. 34 G. 3. c. 70. Bac. Ab. Smuggling, D. 3.

sea (1). Some observations have been already made upon this subject, and therefore it is deemed sufficient to refer the reader to the former part of the work.

2. The duties on *exportation* must of course be regulated by the demands of the foreign consumer. Because, if the duty upon a particular article should be too high, he would be induced to dispense with it, or to trade with other places for a supply. The necessity of obtaining purchasers for our own produce became so apparent in the last century, that all the duties on the exportation of *British* goods and manufactures were repealed by the statute 8 Geo. 1. c. 15. s. 7. with a very few exceptions. But since the passing of this act many alterations have been made. A duty is imposed by the 59 Geo. 3. c. 52. of 10 s. upon the £100 value of all goods of the growth, produce, or manufacture of Great Britain, with a very few exceptions, when exported to any place whatever (3). The other charges on the exportation of British goods are, various duties on coals and cinders, and on culm (4). The operation of these duties on British goods is also regulated with respect to *America* by the 56 Geo. 3. c. 15., which provides, that upon the exportation from the united kingdom of goods, the growth, production, or manufacture of the united kingdom, or any of his majesty's territories in Europe, directly to any of the territories of the united states of America, in any vessel built in those states or condemned as prize there, and being owned by subjects of the said states, and navigated by a master and three-fourths of the mariners also subjects of the said states, no higher or other duties shall be paid than are charged upon goods of the like description when exported in *British-built ships*, owned, navigated, and registered according to law (5). The statute 57 Geo. 3. c. 58. had also provided that the same duties should be paid on exportation of all merchandizes of the growth, produce, or manufacture of Great Britain, exported direct from thence to any place within the territories of the united states of America in British-built ships, owned, registered, and navigated according to law, or in

2dly, Of the Exportation Duties. (2)

(1) Sheppard v. Gosnold, Vaug. 166. Saunder's case, Moor, 244. Molloy, b. 2. c. 5. s. 9. 1 Lord Raym. 501. 388. Eystin v. Studd, Plowd. Com. 465, 466. 5 Burr. 2738. Bac. Ab. Smuggling, D. 2. Com. Dig. Trade, C. 3.

(2) See division of the subject, ante 692.

(3) 59 Geo. 3. c. 52. table C.

(4) 59 Geo. 3. c. 52. table C.; and see in 6 Geo. 3. c. 40. the conditions under which coals may be exported.

(5) 56 G. 3. c. 15. s. 2. 59 G. 3. c. 52. table C.

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ships built in the united states of America, or condemned as prize there, and being owned by American subjects, and navigated by an American master and by mariners three-fourths of whom were Americans, as should be payable on the like exportation to *any other foreign country* (1). But a late statute, 59 Geo 3. c. 54., contains the provision which is now to be observed in respect of the duty on British goods exported to America in British-built or American vessels; it enacts, that the same duties shall be payable on the exportation of all goods of the growth, produce, or manufacture of Great Britain, exported directly from thence to a place within the territories of the united states of America in British-built ships owned, registered, and navigated according to law, or in ships built in the united states of America, or condemned as prize there, and being of American ownership and navigation, as shall be payable on the exportation of the like articles to *Europe.*

The articles *excepted* from the operation of the general duty on British produce, are the following: bullion; corn, grain, meal, malt, flour, biscuit, bran, grits, pearl barley, and Scotch barley, the produce or manufacture of Great Britain; cotton yarn, or other cotton manufactures of the manufacture of Great Britain; linen of the manufacture of any part of the United Kingdom; molasses; military clothing, accoutrements, or appointments (2); refined sugar of all sorts, and sugar candy; goods exported to the Isle of Man under the authority of any licence which the commissioners of the customs in England or Scotland may be empowered to grant;. any sort of craft, food, victuals, clothing, or implements or materials necessary for the British fisheries established in Newfoundland, or in any of his majesty's colonies, islands, or plantations in North America, on due entry thereof, and exported from Great Britain to the said colonies, islands, or plantations; woollen goods of the manufacfacture of Great Britain, exported to any port within the limits of the charter of the East India company; military stores exported by that company. And goods exported from Great Britain to the island of Newfoundland are also exempt from duty until the 5th of July 1824 (3); but after that day, the duties on the

(1) 57 Geo. 3. c. 58. s. 1. and see s. 2. The act to continue in force as long as the American convention; and see 56 Geo. 3. c. 15. s. 1. and 59 Geo. 3. c. 54.

(2) Stat. 50 Geo. 3. c. 107. contains the regulations.

(3) 59 Geo. 3. c. 52. table C. and section 39.

exportation of British produce will become payable on such as is exported to the island of Newfoundland; and in the mean time goods so exported must be duly entered and landed, and will be subject in every respect to all the regulations which affect *goods liable to duty.* The Exportation Duties.

Foreign Goods exported.

The duties on exportation, which have been already mentioned, only affect goods which are of the produce or manufacture of Great Britain, and do not apply to *foreign* goods; the only provision in respect of which is the following, relating to linen: Linen (when plain) of all sorts, except sail cloths, having been imported into Great Britain and secured in warehouses according to law, without the full duties of customs having been paid, is liable to a duty of £15 on every £100 value when exported from such warehouse to foreign parts. (1)

3dly, Of the Duties on Goods carried Coastwise. (2)

The duties payable on goods carried *coastwise* from one place in Great Britain to another, are imposed on coals, culm, and cinders; on slate, of the production of Great Britain; and on stone, of the production of Great Britain. These charges may be easily ascertained, by a reference to the tables annexed to the 59 Geo. 3. c. 52 (3). The duties on coals are not payable on charcoal made of wood (4). All coals imported into *London*, if sold by weight, are subject to a duty of 7s. 6d. on every ton containing 20 cwt.; if by measure, 9s. 4d. the Winchester chaldron. Coals brought up the Paddington canal, under the regulations and restrictions of the act 43 Geo. 3. c. 128., for every ton, 7s. 6d.; and in addition to this, a duty of 1s. 3d. is payable to the proper custom-house officer, and at the end of every quarter is to be paid to the corporation of London, in lieu of the orphans duty, and of all other rates and dues payable to the corporation upon coals imported into the port of London. Coals brought down the Thames nearer to London than the city's stone, placed on the west side of Staines bridge, in the county of Middlesex, and on which the coast duties have not been paid, are subject to a duty of 10 shillings the ton; coals so brought being also subject to an additional duty of 1s. 3d., which is paid in the first instance to the proper officer of the customs, and at the end of every quarter paid over to the corporation of Lon-

(1) 59 Geo. 3. c. 52. table C.
(2) See division of the subject, ante 692.
(3) 59 Geo. 3. c. 52. table D.
(4) 59 Geo. 3. c. 52. table D.

The Duties on Goods carried Coastwise.

don, as before mentioned. The regulations under which coals may be so brought, and such duties received, are contained in the statute 50 Geo. 3. c. 110. When coals are laden on board a vessel cleared coastwise at any port in England or Wales, and delivered in any part beyond the sea before the export duties have been paid, the master will not be permitted again to enter or clear his ship, either coastwise or for parts beyond the seas, before he has paid not only the export duties on the greatest quantity of coals which it shall appear the vessel is capable of containing, but also the further sum of 3s. for every chaldron of such coals, Winchester measure; to be applied and appropriated to the same uses with the duties payable on goods exported (1); which sum of 3s. may be returned, under the provisions of the statute 52 Geo. 3. c. 9. (2) Coals shipped coastwise at a port in *Scotland*, and delivered in any part beyond the seas before the exportation duties have been paid, also render the master liable to a similar duty of 3s. in addition to the exportation duties; which may also be returned under the provisions of the statute 25 Geo. 3. c. 54. All coals that are brought coastwise from one port in Great Britain into any other port in England or Wales, except London, and also except coals brought or carried coastwise within the principality of Wales, until the 1st August 1820, are subject to a duty of 4s. on every ton of 20 cwt. if sold by weight, and in case they are sold by measure, 6s. the Winchester chaldron, with a drawback in the first case of 3s. 8d. and in the latter of 3s. 6d.; and coals sent from the port of Newcastle-upon-Tyne to any other English port, are charged with a duty of 1s. on every Newcastle chaldron (3). Coals carried coastwise to a port within the principality of Wales are made subject to a duty, if sold by weight, of 9d. the ton of 20 cwt., and if sold by measure, 1s. the Winchester chaldron; and by the 13th section of the act (4), it is enacted, that the duties imposed by this act, and specified in table D. to that act annexed, upon coals or culm brought or carried coastwise to any port or place within the principality of Wales, shall continue in force until 1st August 1820, and no longer; and that from and after that day, coals or culm brought or carried coastwise to any port or place within the said principality, shall be subject and liable to

(1) 59 Geo. 3 c 52. table D. tit. Coals.

(2) 52 Geo. 3. c. 9. s. 6.

(3) Various local regulations are here subjoined in the act, containing exemptions and other regulations of too peculiar a nature to be detailed here.

(4) 59 Geo. 3. c. 52.

such and the like duties as coals or culm brought or carried coastwise into any port or place in England, except London, are liable to under that act, or shall or may be subject to under any act or acts in force immediately before the said 1st August 1820. A drawback, not exceeding £1000 in the year, is allowed on coals used for any purpose relating to the carrying on of the works for manufacturing tin plates at Pennygored in Cumberland, according to the provisions of 35 Geo. 3. c. 39.; and a further drawback is allowed, without limitation of sum, on coals used in calcining or smelting copper or lead ore in Anglesey, or which is used in fire engines for draining water out of mines of copper and lead within that island, under the regulations of the act 26 Geo. 3. c. 104 (1). The duties on culm and cinders vary in amount from those on coals, but are regulated on similar principles; and vary according to the places from and to which the exportation is carried on. (2) **The Duties on Goods carried Coastwise.**

The same provisions likewise, in respect to coals entered coastwise and delivered beyond seas, extend to culm and cinders so shipped, and which additional duty may likewise be returned under the conditions imposed by the same acts (3) as authorize a return in the case of coal. Slate, the produce of Great Britain, brought coastwise from one port of the island to another, is charged with a duty of £26 8s. for every £100 value, with a drawback of the like amount. And exactly the same duty (but without any allowance of drawback) is payable for stone brought coastwise as for slate; but marble, limestone, or ironstone, stone cut into millstones, grindstones, or whetstones, or posts and caps for corn-stacks or mowsteads, troughs, gate-posts, or other husbandry articles, and stone used to repair sea-banks and sea-walls in Great Britain, growan stone, china or other stone to be used in the making of porcelain or pottery, or any stones cut into burr stones, may be entered without payment of duty, under the regulations and restrictions in the 34 Geo. 3. c. 51. and 39 & 40 Geo. 3. c. 51.; and in addition to these provisions, it is enacted by the 50th section of the act 59 Geo. 3. c. 52. that from and after the 5th of July 1819, a drawback of the whole duty on stone, the production of Great Britain, brought coastwise from one port to another in Great Britain,

(1) See also, as to the export duties on coals, 59 Geo. 3. c. 52. table D.

(2) 45 Geo. 3. c. 128. 50 Geo. 3. c. 110.

(3) 52 Geo. 3. c. 52. 25 Geo. 3. c. 54.

The Duties on Goods carried Coastwise.

shall be allowed in respect of such stone as may be used in the making of barn floors; the drawback to be allowed to the person using the stone, on proof to the satisfaction of the commissioners of the customs that such duty was paid, and the stone so employed. And by the 51st section, the like drawback is allowed on stone used for the paving of streets and public ways, upon proof of payment of the duty, and under such rules and restrictions as may be directed or made from time to time by the commissioners of the treasury, or any three of them. An order has been issued from the board of treasury, dated the 7th July 1819, in which it is stated that it had been represented to their lordships that several vessels from Aberdeen were then in the river, laden in ballast with Scotch granite, used solely for the purposes of paving, which until the late consolidation act had been exempted from the payment of duty; and the lords of the treasury stated it to be their opinion, that the present and all future cargoes of a similar kind, coming from Aberdeen, should be admitted to entry duty-free, on the person purchasing or using such stone taking an oath, as heretofore, before the proper officer of the department of the customs, that the stone in question is intended solely for the purposes of paving. And their lordships will submit a clause to the consideration of parliament in the next session, legalizing a continuance of the exemption from duty which had formerly been granted in favour of the description of stone above specified, and which it was not their intention that the act of the present session, for consolidating the customs, should have the effect of annulling. (1)

4thly, Of the Tonnage Duties. (2)

The *tonnage* duties imposed by the 59 Geo. 3. on vessels entering inwards or outwards, in a port of Great Britain, from or to foreign parts (3), a table of which duties is annexed to the act, are to be paid to the proper officer of the customs, and the officers are forbidden by law to allow any vessel to break bulk, or any part of her cargo to be discharged; and cannot issue any order, nor grant any document for unshipping or landing goods brought by any vessel, subject to the payment of the duties of tonnage, until the duties have been fully paid to the proper officer; and when a doubt or dispute shall arise with respect to the true tonnage of a ship, so that a perfect entry cannot be passed, the duties are to

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(1) Pope, tit. 251.

(2) See division of the subject, ante 692.

(3) Except ships in ballast and fishing vessels, 59 Geo. 3. c. 52. s. 41. and infra.

be deposited with the officer, previously to any document being issued or granted for unshipping any part of the cargo; and the duties are to be paid on every report inwards, and on every entry outwards of each vessel, for each voyage which the vessel shall report inwards or enter ouwards at any port in Great Britain. The tonnage of the vessel, when British-built or British-owned, is to be computed and taken according to the register, under the provisions of the registry act, 26 Geo. 3. c. 60; and the tonnage of any other vessel, when a doubt or dispute arises, is to be ascertained in Great Britain by admeasurement, in the mode prescribed by that act; but these provisions do not extend to alter or repeal the regulations of the 56 Geo. 3. c. 9. which are still to be applied to the duties on such packets or passage vessels as are specified in the table annexed to the 59 Geo. 3. (1) No vessel, upon which the tonnage duty is payable, is permitted to be cleared inwards in any port of Great Britain, unless the tonnage duty has been duly paid to the proper officer of customs; and if the duty be not paid within thirty days from the report of a vessel arriving from foreign parts, the commissioners of customs are authorized, if they think fit, to cause the vessel and her tackle to be detained, and afterwards sold publicly to the best bidder, and the produce to be applied, first to the charges that may arise by such detention and sale, next to the tonnage duty, and the overplus to be paid to the proprietors of the vessel, or other person duly authorized by the proprietor to receive it, and the collector and other officers of the customs were forbidden, by the statute which contained this provision, to allow any vessel to be entered outwards for foreign parts, or any cocket or entry to pass for goods to be shipped on board any such vessel, unless the tonnage duty imposed on such vessel has been first duly paid (2). The tonnage duty, which was imposed by an old statute of William and Mary, having been made payable according to the dimensions of the vessel, as calculated from the midship beam and from the deck, it was held, that no duty could be required in respect of a vessel which had no midship beam nor deck, but was made entirely open. For it was said, that no duty was created by the act but according to the measure; and therefore, as the ship could not be measured according to the statute, the duty could not be charged (3). The tonnage duty imposed by the late stat. 59 Geo. 3. does not extend to a vessel employed in the fisheries

The Tonnage Duties.

(1) 59 Geo. 3. c. 52. s. 40.; and see the duties on package vessels, by 56 Geo. 3. c. 9. infra.

(2) 42 Geo. 3. c. 43. s. 19 & 20.

(3) Newerry v. Colegate, Bac. Abr. tit. Smuggling, D. 1.

The Tonnage Duties.

on any part of the coast of Great Britain, and not entering outwards for foreign parts; nor to a vessel employed in bringing oysters from Jersey or Guernsey into a port in Great Britain; nor to British or Irish-built vessels owned by British subjects, and not required to be registered; nor to vessels which may enter outwards or inwards in ballast only (1).

Packets.

The only remaining provisions that are necessary to be noticed with respect to the tonnage duties, are those contained in the statute 56 Geo. 3. c. 9. with regard to foreign packets or passage vessels. This enactment made it lawful for the king, by his royal proclamation, to be issued by the advice of his privy council, or by his order in council to be published from time to time in the London Gazette, to direct such duty as shall be therein specified, to be paid in the ports of Great Britain on the entering or clearing out of the packets or passage vessels of such foreign countries (2) as shall be named in the proclamation or order in council isued or published as aforesaid, and to revoke, diminish, or increase such duties to the same amount as similar duties may be respectively revoked, diminished, or increased on British packets or passage vessels entering or clearing out from the ports or harbours of such foreign countries. This provision was made in consequence of British packets or passage vessels entering or clearing out from the ports or harbours of foreign countries, being subject to certain imposts in the nature of tonnage duties, port dues, harbour dues, or otherwise, which were continually varying in amount; and therefore it became expedient that the king should have a power of imposing corresponding duties on foreign vessels that might arrive in Great Britain. But the act does not extend to vessels used only for the purposes of pleasure, and which do not carry goods or passengers for hire and reward (3). A tonnage duty is charged on French vessels at the rate of 3 s. 6 d. for every ton burthen of every packet or passage vessel which shall lade or unlade goods, or take in or set on shore passengers, in any port, creek, harbour, or road of Great Britain; and the tonnage of the vessel, when a doubt or dispute may arise, is to be ascertained by the proper officer of the customs, by admeasurement in the manner directed by the registry act 26 Geo. 3. c. 60. The officers of the customs are empowered to detain a packet or passage vessel liable to the

(1) 59 Geo. 3. c. 52. s. 41.

(2) France is not included, a vessel of which country is subject to a distinct tonnage duty of 3s. 6d. See infra.

(3) 56 Geo. 3. c. 9. s. 8.

payment of the duty, until the same is paid; if payment be not made for the space of thirty days after the arrival of such vessel at any such port, creek, harbour, or road in this kingdom, the commissioners of the customs are empowered to cause such packet or passage vessel, and her masts, apparel, and furniture, to be sold publicly to the best bidder, and the produce to be applied first to the charges that arise by such detention and sale, next to the payment of the tonnage duty, and the overplus to be paid to the proprietor of such packet or passage vessel, or other person duly authorized by the proprietor to receive the same (1). This tonnage duty is to be paid into the hands of the proper officers of the customs at the port or place where it shall become payable (2); and to the intent that the duty may be duly answered and paid, it is enacted that no officer of the customs at any port where the duty becomes payable shall take or receive any entry or report outwards for any such vessel liable to the duty, nor grant any cocquet for goods intended to be shipped on board such a vessel, nor is the vessel to be allowed to depart from such place, until the duty has been paid according to the directions of the act, to the collectors or other principal officers of the customs authorized to receive it, and the master has shewn the receipt to the officer (3). This statute, as before stated, does not extend to a vessel used only for the purposes of pleasure, and not employed in carrying goods or passengers for hire or reward. (4) The Tonnage Duties.

The duties which are not affected by the consolidation act, and are consequently payable independently of those imposed by that statute, are the South Sea duties; 2. The quarantine duties; 3. The duties payable under the dock acts; and 4. The duties on merchandize employed in trade between Great Britain and Ireland.

The duties on merchandize and ships engaged in trade within the limits of the late exclusive trade of the South Sea company, are under the management of the commissioners of customs, and are to be recovered as other custom duties of the same nature (6). All goods imported into the United Kingdom from any place within these limits (except blubber, train oil, head matter, or 5thly, Of the South Sea Duties. (5)

(1) 56 Geo. 3. c. 9. s. 2.
(2) 56 Geo. 3. c. 9. s. 3.
(3) 56 Geo. 3. c. 9. s. 4.
(4) 56 Geo. 3. c. 9. s. 8.
(5) See division of the subject, ante, 692.
(6) 55 Geo. 3. c. 57. s. 8—12.

The South Sea Duties, &c.

whale fins, sealskins, and other produce of fish or marine animals taken by the crews of British and Irish-built ships) are subject to a custom duty of £2 on every £100 value of the goods; and vessels entering outwards or inwards at any port in the United Kingdom to or from a place within the limits of the exclusive trade, are subject to a custom duty of 1s. 6d. upon every ton burthen (1). The South Sea duties will expire when the guarantee fund, as it is called, for securing to the company the price at which their exclusive trade was lately purchased by government, is completed. (2)

6thly, Of the Quarantine Duties. (3)

Custom duties are also payable to his majesty on ships and their cargoes which have performed *quarantine*, as it is deemed reasonable that those who are obliged to perform quarantine should defray the charge to which that operation gives rise (4). The duties vary according to the place from which the ship has arrived, and are much lower when the importer is furnished with a clean bill of health than when she is unprovided with that document (5). The liability to perform quarantine, together with the mode in which it is enforced, will be the subject of future consideration.

7thly, The Dock Dues.

The tonnage duties payable to the crown under the provisions of the West India dock act, are expressly exempted from the operation of the 59 Geo. 3. c. 52. These duties were payable to his Majesty in consideration of the benefit afforded to the trade to the port of London by the establishment of the docks, and were made to endure for the term of 14 years after the passing of the 39 Geo. 3. c. 69. (6) They were vested in the crown for the purposes of that act, and were to be paid at the time of the vessel's entering inwards or clearing outwards at the custom house in the port of London (7). Some exemptions were engrafted upon this general liability, but the duties themselves seem to be now expired, and therefore it is unnecessary to consider them any farther. Other rates were made payable to the city of London (8), and others to the West India dock company, for the accommodation afforded (9). The act contained the

(1) 55 Geo. 3. c. 57. s. 5.
(2) 55 Geo. 3. c. 57. s. 13. ante.
(3) As to the law of quarantine, see post.
(4) 45 Geo. 3. c. 10.
(5) 45 Geo. 3. c. 10.
(6) West India dock act, 39 Geo. 3. c. 69. s. 134. Loc. & Per.
(7) 39 Geo. 3. c. 69. s. 134.
(8) 39 Geo. 3. c. 69. s. 136.
(9) 39 Geo. 3. c. 69. s. 137.

following provision for securing the payment of the tonnage duties. No collector of customs inwards or coastwise in the port of London, could under this statute permit any vessel on which duties of tonnage were imposed by the act, to be entered inwards from foreign parts or coastwise, until the master had paid such duties, and had produced to the collector a certificate from the collector of the duties, certifying that such duties had been fully paid; nor could any collector of customs outwards or coastwise in the port of London permit a vessel on which tonnage duties were imposed by the act to be cleared outwards, until the master had paid to the collector the full duties, which payment might be made appear by the signature of the collector to the documents, which must necessarily be produced to him at the time of clearing the vessel either outwards to foreign parts or coastwise outwards, as the case might be, which certificates and signatures the collectors were required to sign and give, upon pain of forfeiture of £20 with costs of suit. (1)

The Dock Duties.

8thly, Of the Countervailing and other Duties between Great Britain and Ireland.

The consolidation act also contains an exception of the *countervailing duties* charged in respect of goods employed in trade between Great Britain and Ireland. The sixth article of the act of union was framed with a view to secure to each country a reciprocity of advantage in matters of trade; and the countervailing duties were imposed in furtherance of this object. This provision, by virtue of which these duties are charged, enacts that any articles, of the growth, produce, or manufacture of either country, which are subject to internal duty, or to duty on the materials of which they are composed, may be made subject, on being imported into either country from the other, to such countervailing duty as shall appear to be just and reasonable, in respect of such internal duty or duties on the materials; and that for those purposes the articles specified in the Schedule number one, A. and B. shall be subject to the duties set forth therein, which are liable to be taken off, diminished, or increased in the manner therein specified; and that upon the export of those articles from either country to the other respectively, a drawback shall be given equal in amount to the countervailing duty payable on such articles on the import thereof into the same country from the other; and that in like manner in future, it shall be

(1) 39 Geo. 3. c. 69. s. 144. Pope, tit. 239.

The Countervailing and other Duties between Great Britain and Ireland.

competent to the united parliament to impose any new or additional countervailing duties, or to take off or diminish such existing countervailing duties as may appear on like principles to be just and reasonable in respect of any future or additional internal duty on any article of the growth, produce, or manufacture of either country, or of any new or additional duty on any materials of which such article may be composed, or of any abatement of duty on the same; and that when any such new or additional countervailing duty shall be so imposed on the import of any article into either country from the other, a drawback equal in amount to such countervailing duty, shall be given in like manner on the export of every such article respectively from the same country to the other (1). The countervailing duties were contained in tables annexed to the act of union, 39 & 40 Geo. 3. c. 67. and have been since increased and varied by acts of parliament (2). The consolidation act also contains some other provisions to regulate the duties payable on the trade between Great Britain and Ireland, which may be conveniently noticed here. The duties imposed on foreign goods imported into Great Britain are frequently higher when they are not imported directly from the place of their growth than when they come immediately from such place. But the community of interest between Great Britain and Ireland was thought to require that the same duties should be paid on foreign goods imported into Great Britain from Ireland, as would have been charged if they had come directly from the foreign country without going to Ireland. The consolidation act 59 Geo. 3. accordingly provides, that on the importation of such foreign goods into Great Britain from Ireland, the import duty of customs shall be paid, as if the foreign goods had been imported from foreign parts, either directly from the place of their growth or produce, or not directly from such place, according as they were in fact at first so imported into Ireland from foreign parts; and that for the purpose of ascertaining whether any such goods were first imported into Ireland directly from the place of their growth or produce, or not directly from such place, it shall be specified in every cocket or clearance of any such foreign goods exported from Ireland into Great Britain, whether such goods were first imported directly from the place of their growth or produce or

(1) 39 & 40 G. 3. c. 67. art. 6.

(2) Pope, tit. 255. and see Appendix.

not, and the import duty of customs on such goods shall be payable accordingly on such goods when imported into Great Britain from Ireland; and if it shall not be expressed in the cocket or clearance of the goods, whether they were so first imported into Ireland directly from the place of their growth or produce, or not directly from such place, the goods shall be liable to such duties of customs on their importation into Great Britain from Ireland, as if they had been imported from foreign parts, not directly from the place of their growth or produce (1). After the 5th of July 1819, all the duties of customs and excise charged and paid on the importation of any foreign or colonial goods into Great Britain, shall be drawn back on the exportation of the goods from Great Britain to Ireland, and shall be paid and allowed to the exporters under such regulations as are required by any act in force in Great Britain immediately before that day. (2)

The Countervailing and other Duties between Great Britain and Ireland.

Thirdly, The regulations which it is our purpose in the next place to inquire into, are those which have been established to secure the payment of the custom duties to the crown, and to prevent any illegal evasion of them. And 1st, we shall inquire into the *ports and places* at which a vessel may lawfully receive or discharge her cargo; 2dly, The *times* assigned for the discharge or loading; 3dly, The provisions with respect to the *manifest* which is required to accompany the ship on importation or exportation; 4thly, The master's *report* and merchant's *entry*, the merchant's declaration of the value, the bill of sight, the allowances for tare, damage, &c.; 5thly, Of the cocket or clearance; 6thly, The warrant for landing or shipping goods, and the presence of the officer on such an occasion; 7thly, The forms and regulations on carrying goods coastwise. When these preliminary regulations have been concluded, we shall proceed to inquire into the *penalties and forfeitures* consequent on trading in prohibited and uncustomed goods; — the powers of searching for and seizing such goods; — the method of procuring restoration to be made in cases where it is allowed; — and, lastly, the immunities and protection afforded to the officers concerned in the execution of laws relating to the revenue, and the liability which they incur.

Thirdly, Of the Regulations prescribed to secure the Payment of the Duties. (3)

(1) 59 Geo 3 c. 52. s. 9. Pope, tit. 37.; and see 55 Geo. 3. c. 83. s. 2. 55 Geo. 3. c. 118. 56 Geo. 3. c. 93.

(2) 59 Geo. 3. c. 52. s. 8.

(3) See division of the subject, ante, 692.

The Ports and Places of Discharge and Loading. (1)

1st, The *places* assigned for the discharge and loading of vessels, or for other purposes connected with the security of the revenue of customs, are distinguished as *ports*, *members*, and *creeks*. *Ports* are said to be those places to which the officers of customs are appropriated, and which include the privileges and guidance of all members and creeks that are allotted to them (2). *Members* are defined to be places where a custom-house has been kept of old time, with officers or deputies in attendance; and they are lawful places of exportation or importation. *Creeks* are defined to be places where officers commonly are or have been placed for prevention only, and which are not in general lawful places of exportation or importation, without particular licence from the port or member under which they are placed (3). In the 15th report of the commissioners of public accounts, a creek is said to be, in the language of the customs, a place included within the limits either of a head or member port, as set out by the commissioners of the court of exchequer, and at which officers competent to transact the coast business are stationed by order of the board of customs (4). The prerogative of appointing ports and havens, which are called the gates of the realm, is vested by law in the crown (5). But when ports were once established, it seems that the king could not restrict his subjects in the enjoyment of them, or confine exportation and importation to some ports, in exclusion of others, because all public ports were considered free and juris publici (6). However, such a restriction was introduced into commerce at a very early period. The statute 4 Hen. 4. c. 20. provides that all merchandize entering into the realm of England, or going out of it, shall be charged and discharged in the great ports of the sea, *and not in creeks and small arrivals*; and a breach of this law subjected the goods to forfeiture (7). The great ports of England, which are sometimes called the ancient or head ports, are London, Ipswich, Yarmouth, Lynn,

(1) See division of the subject, ante, 692, and last page.

(2) Postlethw. Dict. Com. tit. Ports.

(3) Postlethw. Dict. Com. tit. Ports; and see the definition of roads, ports, creeks, &c. Hale's Tract. de Portibus Maris, part 2. c. 2. vol. 1. 46.

(4) 15th Report of Comm. of Public Accounts, Pope, tit. 18. reg. 81.

(5) Hale de Port. Mar. p. 2. c. 3. 1 Harg. Law Tracts, 53. 1 Bla. Com. 263. Mad. Excheq. 530.

(6) Harg. Law Tracts, 99. Hale de Port. Mar. part 2. c. 10. Bac. Ab. tit. Smuggling, F 2. 2 Inst. 61. 3 Inst. 182. 2 Rob. Ab. 114. Com. Dig. Trade, D 1. and see 28 Edw. 3. c. 13. 12 Car. 2. c. 4. Rules and orders at the end of the act.

(7) 4 Hen. 4. c. 20.

Boston, Hull, Newcastle, Berwick, Carlisle, Chester, Milford, Cardiff, Gloucester, Bristol, Bridgwater, Plymouth, Exeter, Poole, Southampton, Chichester, and Sandwich; and each of these ports has several subordinate members and creeks attached to it (1). The statute 1 Eliz. c. 11. provided "that all merchandize should be discharged and laden in and upon such open places, quays, and wharfs as the queen should appoint by virtue of her commission or commissions within the ports of London, Southampton, Bristol, Westchester, Newcastle, and the suburbs; and in some open places, quays, or wharfs in all other ports, creeks, havens or roads (except Hull) where a customer, controller, and searcher, or the servants of any of them, had, during ten years past, been accustomably resident, or should thereafter be resident, under a penalty of forfeiting the goods or their value (2)." Any owner or master of a vessel who should receive on board or discharge goods contrary to this statute, was also made liable to a penalty of £100 (3). The king was further empowered by the statute 13 & 14 Car. 2. c. 11. to issue commissions out of the court of Exchequer to appoint all such further places, ports, members, and creeks (except the town of Hull), as could be lawfully made, for landing and discharging, lading, or shipping goods within England, Wales, or Berwick, and to provide to what ancient and head ports such places, members, or creeks should belong; and where any such member, creek, or place was appointed by virtue of such commission, the customer, collector, comptroller, and searcher of the head port were to reside, either in person or by deputy, for clearing and passing shipping, and discharging goods. The commissions so issued were to designate the extent, bounds, and limits of every port, haven, and creek, so that the extent and privileges of each might be ascertained and known. And every person was forbidden to lade or put off from any key, wharf, or place on the land, on board a ship for exportation, any merchandize, except fish British-taken, sea-coal, stone, and bestials; or to discharge from any vessel not wrecked or leaky, any merchandize, except fish British-taken, bestials, and salt, otherwise than upon such open places, keys, or wharfs, as his majesty's commissioners should appoint in the port of London, and the members and liberties thereof, or in any other port, place, member, or creek within England, Wales, or Berwick, without the special *suffer-*

The Ports and Places of Discharge and Loading.

(1) Postlethw. Dic. Com. tit. Ports. Hale de Portibus Maris, 48. Bac. Abr. tit. Smuggling.

(2) 1 Eliz. c. 11. s. 2.

(3) 1 Eliz. c. 11. s. 3.

The Ports and Places of Discharge and Loading.

ance and leave of the commissioners and officers of the customs, under a penalty of the forfeiture of the goods (1). A similar provision was afterwards made with regard to Scotland by a statute of Queen Anne; and the queen was empowered to issue commissions from time to time out of the court of Exchequer in Scotland, to appoint all such further places, ports, members, and creeks in Scotland, as might lawfully be made for landing and discharging, lading or shipping, goods in Scotland, and to nominate to what ancient and head ports those places should appertain; and the customer, collector, comptroller, and searcher, were to reside either in person or by deputy at the appointed places, for entering, clearing, and passing, and shipping and discharging, vessels and their cargoes. The commissioners were also to appoint the extent, bounds, and limits of every port, haven, or creek in Scotland, so that the privileges of each might be ascertained; after which appointment, the new ports, members, and creeks became subject to the same regulations as those appointed in England (2). A late statute of 55 Geo. 3. c. 118. has made it lawful for the commissioners of customs, whenever and so long as they may deem it proper, to allow *vessels arriving from Ireland* to enter inwards at those creeks, harbours, or basons of Great Britain, where a principal coast-officer, comptroller, or other principal officer of customs has been appointed and stationed (3). The statute 22 Car. 2. c. 11. with the same object as the acts of parliament to which we have already alluded, contained provisions for making a new quay or wharf from London bridge to the Temple, of the breadth of 40 feet (4); and this act made it lawful for any person to lade or unlade goods at any of these wharfs or quays, for wharfage and cranage; and the proprietors and persons concerned were allowed to demand such rates and no other as should from time to time be appointed by his majesty in council (5). Some other provisions were also made at the same time with regard to Bridewell dock, which it is material to mention. For the convenience of trade, it was enacted that the channel of Bridewell dock, from the channel of the river Thames to Holbourn bridge, should be sunk to a sufficient level to make it navigable; the ground set out for the breadth of the channel and of the wharfs on each side not being less in breadth than 100 feet, nor more than 120. And the line of the channel, and the wharfs and levels thereof, together with

(1) 13 & 14 Car. 2. c. 11. s. 14.
(2) 6 Ann. c. 28. s. 18.
(3) And see 56 Geo. 3. c. 93.
(4) 22 Car. 2. c. 11. s. 46. Pope, tit. 10.
(5) 22 Car. 2. c. 11. s. 46.

the cranes and stairs, were to be ascertained by the lord mayor and court of aldermen, with his majesty's approbation, and set out by the surveyors accordingly, at or before the first of May then next; and all the wharf ground on each side of the river was enjoined to be kept open and at large, without any division or separation, and each person's property therein to be distinguished only by denter stones in the pavement. It was also provided, that no lighter-boat or vessel should lie before these quays or wharfs longer than was necessary for lading or unlading the goods, without the consent of the wharfingers or proprietors; but that every person should be allowed to land goods at any of the wharfs or quays within the intended channel, the proprietor or wharfinger demanding only such rates as should be appointed by his majesty, with the advice of his privy council; in addition to which, reasonable rates for tolls and other profits arising by the navigation of the channel, were to be appointed by the lord mayor and court of aldermen, with the approbation of the barons of the exchequer, or two or more of them; and these tolls or profits were vested in the mayor, commonalty, and citizens of the city of London, for the preservation of the navigation and sluices, and other incidental expences (1). But this enactment did not annul the power vested in the crown to appoint commissioners to nominate particular places to be quays and wharfs within the city of London, and to declare the bounds and privileges of that port and the other ports of England, nor any other powers and privileges for the preservation of his majesty's revenue of customs collected there (2). The East India, West India, and London docks, are declared legal quays by the several statutes which authorized their establishment (3). And when pilchards or other fish are exported, for the purpose of obtaining the bounty, the commissioners of excise are empowered to authorize them to be exported from such convenient place as they shall deem proper (4). The stat. 13 & 14 Car. 2. c. 11. provides that no vessel arriving from foreign parts " shall be above three days coming from Gravesend to the place of her discharge

The Ports and Places of Discharge and Loading.

(1) 22 Car. 2. c. 11. s. 47. but Bridewell dock and Fleet ditch were in part filled up by 6 Geo. 2. c. 22.

(2) 22 Car. 2. c. 11. s. 84.

(3) East India dock, 46 Geo. 3. c. 113. s 13. West India dock, 39 Geo. 3. c. 69. s. 85. London docks, 39 & 40 Geo. 3. c. 47. s. 73. ante, 558. Pope, 238—240. The Rotherhithe Comm. Docks are not legal quays; and goods cannot be landed or loaded there without special sufferance of commissioners of customs granted for that purpose. 50 Geo. 3. c. 207. s. 3. Pope, tit. 241.

(4) 39 Geo. 3. c. 65. s. 4. Pope, tit. 10. Where see also statute 28 Edw. 3. c. 13. against compelling merchants to come to particular ports.

The Ports and Places of Discharge and Loading.

within the Thames, without touching or staying at any wharf, quay, or place adjoining to either shore between Gravesend and Chester's quay, unless apparently hindered by contrary winds, draft of water, or other just impediment, to be allowed of by the persons appointed for managing the customs, the collectors inward, or other principal officers." And in all out-ports and members, the vessel must come directly up to the place of unlading and making entry, so far as the condition of the port requires and will admit, under the penalty of forfeiting £100 (1). Goods may be laden or discharged at other places besides the legal quays, on a *sufferance* being granted for that purpose by the commissioners of customs (2); but if goods be improperly shipped without a sufferance, they are forfeited. (3)

2dly, Of the Times prescribed for loading and discharging Vessels. (4)

2dly. The regulations of the revenue also require that the goods should be laden and discharged at particular *times*. The statute of Elizabeth already alluded to, when it confined importation and exportation to the legal quays, also imposed restrictions in point of time (5). According to this act, merchandize can only be discharged and laden in the day-light, between sunrise and sunset, from the first of March until the last day of September, and between the hours of seven in the morning and four in the afternoon from the last day of September until the first of March. A penalty of £100 is incurred by a breach of this law, and the goods are forfeited (6). However, the commissioners of the treasury are authorized by later statutes, whenever they deem it expedient for the accommodation of the revenue, and the security of trade, to alter the hours during which the officers, clerks, or other persons employed in the service of the customs at any port of Great Britain are required by law to attend in the execution of the duties of their respective offices, and to regulate and direct the attendance of every such officer, clerk, or other person so employed, in such manner, and during such times, and at such places as the commissioners think right in regard to the public service (7). Another qualification is also ingrafted on the statute of Eliz. by the act 57 Geo. 3. c. 116. s. 2. which provides that it shall be lawful for any person to receive or take on board, at any time before and until sunset, from the 30th of

(1) 13 & 14 Car. 2. c. 11. s. 2.
(2) 13 & 14 Car. 2. c. 11. s. 14. 50 Geo. 3. c. 207. s. 3. Loc. & Per.
(3) Baker v. Liscoe, 7 Term Rep. 171. 28 vol. Mr. Justice Ashurst's paper books, 74. MS.
(4) See division of the subject, ante 692. 725.
(5) 1 Eliz. c. 11. s. 2.
(6) 1 Eliz. c. 11. s. 3.
(7) 47 Geo. 3. sess. 1. c. 51. s. 8. 56 Geo. 3. c. 35. s. 2.

September to the 1st of March in each year, into any vessel bound to parts beyond the seas, any goods which may be lawfully exported, and which have been put off or waterborne from any quays in the port of London according to law, within the legal hours for putting off the same (1). These provisions respect the time at which the cargo may be either discharged or laden on board. According to the modern practice, the hours during which goods may be landed and shipped vary at many ports, and sometimes at the same port, as at the several docks in and near London. (2)

The Times for loading and discharging Vessels.

3dly. We will proceed to consider the *manifest* which is required to accompany the vessel. The *manifest* is a written document containing the particulars of the ship and cargo. The manifest on *importation* will be first considered, and then the manifest on *exportation*. In considering the first division, we shall have occasion to inquire, 1st, into the statutes which require a manifest in respect of goods in general, on their being imported; 2d, the manifest in respect of wine; 3d, in respect of tobacco; 4th, the manifests of ships clearing out from the colonies; 5th, the manifest of the crew in the West India trade; lastly, we shall consider the mode in which the production of the manifest may be enforced; the consequences of goods being imported without a manifest, and of the manifest not agreeing with the report. Afterwards we shall consider the manifest on exportation.

3dly, Of the Manifest. (3)

The statute 26 Geo. 3. c. 40. (4) provides that no goods shall be *imported* into Great Britain in a British vessel, without a *manifest* or *content* in writing, signed by the master, containing the names of the places where the goods shall have been laden, the name and built of the vessel, and the true admeasurement or tonnage thereof, according to the register, together with the christian name and surname of the master, and the place to which the vessel belongs, and a correct and particular account of all the cargo, and of all packages of goods so laden or taken on board, and of the particulars of the cargo which is stowed loose, and of the following particulars, in words at length; that is to say, the respective numbers of the packages, with a particular description thereof, whether leaguer, pipe,

(1) 57 Geo. 3. c. 116. s. 2. Pope, tit. 10. note b.

(2) Pope, tit. 10.

(3) See division of the subject, ante, 692. 725.

(4) And see before this act 13 & 14 Car. 2. c. 11. s. 3.

Of the Manifest.

butt, puncheon, hogshead, barrel, or other cask or package, describing such other cask or package by its usual or ordinary name, or whether case, bale, pack, truss, chest, box, bundle or other package; or by such other name or description as the same is usually called or known (1). In an order issued by the commissioners of customs dated the 20th February 1816, it is stated that it had been represented to the commissioners that the masters of British vessels entering inwards from Senegal and other British settlements on the coast of Africa had not been required to produce a manifest or content of the cargo, agreeably to the 26 Geo. 3. c. 40.; but as this practice had not been sanctioned by any authority of the lords of treasury or of the board of customs, the commissioners gave notice that if, after the expiration of nine months from the 20th of February, any goods should be imported in a British ship from any part of Africa, without the manifest or content in writing as required by the act, the master of the importing vessel would be prosecuted for the penalty as the law directs (2). A similar relaxation of practice had also taken place with regard to requiring the insertion of the marks and numbers on hogsheads of sugar imported from the West Indies, in the manifests produced by the masters of the importing vessels, and also in the reports of their cargoes; but it appears that the insertion of these particulars in both documents is required by the 13 & 14 Car. 2. c. 11. (3) and 26 Geo. 3. c. 60. and therefore cannot be dispensed with. It is also especially provided for in the ordinary form of the master's reports (4). An important and considerate regulation has been lately made by the board of treasury with regard to the operation of the 26 Geo. 3. c. 40., directing that if, upon the delivery of the cargoes of vessels, it shall appear that any packages which may be erroneously marked do in substance and contents correspond with the report and the manifest, neither the goods nor vessels shall be deemed liable to seizure by the officers of customs on account of such an error. (5)

Wine Manifest.

The manifest on the importation of *wine* is regulated by special provisions in the statute 26 Geo. 3. c. 40. The statute requires that no wine of any sort shall be imported into Great Britain from any place not belonging to or under the dominion of the crown of Great Britain in any vessel without a manifest,

(1) See form of manifest, Appendix.

(2) Pope, tit. 9. rule 3. note. Faith v. Pearson, 6 Taunt. 439. 440—442.

(3) 13 & 14 Car. 2. c. 11. s. 10.

(4) Order of the board of customs, dated 4th December 1813. Pope, tit. 9. rule 3. note b.

(5) Pope, tit. 9. in notes.

signed by the master before the clearing or departure of the vessel from each place where the wine was laden on board, containing the names of the places of lading, the name and built of the vessel, and the true admeasurement and tonnage, together with the names of the master, the place to which the vessel belongs, and a particular account of the quantity of wine, distinguishing the quantity of each sort, and the marks on the packages, and, if known, the names of the consignees, and also in words at length the numbers on the packages, with a particular description of them; and this manifest is required in addition to all such certificates and other documents which the law required to accompany the goods at the time of passing the 26 Geo. 3. c. 40. However, in practice, after the passing of the 26 Geo. 3., wines were frequently imported from places not under the dominion of the crown of Great Britain, without being accompanied by the manifests directed by the act. And after the passing of the 54 Geo. 3. c. 36. wines were also imported from the East Indies and the Cape of Good Hope without being manifested as required by that statute. But the commissioners of the customs gave notice on the 11th December 1817, that if any wine should be imported from a place not belonging to the crown of Great Britain, after the expiration of three months from that day, without the manifest required by the 26 Geo. 3., such wine would not be admitted to entry; and if, after six months time from that day, wine imported from the East Indies and the Cape of Good Hope should not be manifested as required by the statute 54 G. 3. c. 36. it would be seized and prosecuted according to the directions of that statute (1). When wine is imported from foreign parts not subject to the crown of England, the master is required, before his departure from the place where the wine is laden on board, to verify upon oath the truth of the manifest before the British consul or other chief British officer, if there be any such resident at or near the place where the wine is taken on board. (2)

Of the Manifest.

The manifest in regard to *tobacco*, is regulated by the statutes 47 Geo. 3. sess. 1. c. 25. s. 2. (3), and 29 Geo. 3. c. 68. (4), and differs according to the place from whence the tobacco is imported (5). The manifest in respect to goods coming from the East Indies, the Cape of Good Hope, and St. Helena, has

Tobacco Manifest.

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(1) Pope, tit. 9. rule 4. note.
(2) 26 Geo. 3. c. 40. s. 4.
(3) Pope, tit. 79.
(4) See s. 16, 17, 18, 19, 20, 26. ante, Importation.
(5) See 53 Geo. 3. c. 155. s. 14. 54 Geo. 3. c. 36. s. 3, 4, 5, 6, 8, 14. as to the Cape and St. Helena, 54 Geo. 3. c. 36. s. 9, 10. 12. Pope, Law of Customs, tit. 90.

Of the Manifest.

been also made the subject of special provisions, the general features of which are similar to those that prevail with respect to other goods, though they differ in points of minor importance, which it is not considered necessary to detail at large.

Manifest of Ship clearing out from Colonies.

Before a vessel can be cleared out for Great Britain with any goods whatever from any of the *British colonies* or territories, the master is required to deliver the manifest to the collector of the customs, if there be such an officer at the place, and if there be not, then to the chief officer of customs, and when there is no such officer, to the principal officer or magistrate, or some person appointed by him, resident at or nearest to such place, who is then to cause a duplicate of it to be made, and indorse his name, and the date when it was produced to him, on the original manifest, and return it to the master on or before the clearing of the vessel, and, upon the clearing, immediately to transmit the copy under his hand and seal to the collector or comptroller at the port to which she is consigned and to which the manifest refers. (1)

Manifest of Crew.

Besides the manifest of the ship and cargo, a manifest or list of the *crew* is also required to be produced in the West India trade, after the ship's arrival out at any of the plantations as well as after it has arrived at home in a port of Great Britain. The master of every merchant ship trading to the plantations is required by law, within ten days after his arrival out at any port in the plantations, and also within ten days after his arrival home at any port in Great Britain, to deliver upon oath, to be made before the collector or comptroller, an exact description of all the crew on board the ship at the time of clearing out from the port in Great Britain, and also of the crew on board at the time when she arrived in the plantations, and an exact description of every seaman or other person who has deserted from the ship, or died during the voyage, and also a true account of the wages due to each person so dying at the time of his death; and every master omitting, neglecting, or refusing so to do, shall for every such offence forfeit £50; and this list is to be open to the inspection of every master of a ship or other person who may think fit to require it from time to time. (2)

Production of Manifest to Officer, and Consequence of Non production.

Lastly, with respect to the manifest on importation, we have to consider the mode in which the *production of it* may be en-

(1) 26 Geo. 3. c. 40 s. 3. Faith v. Pearson, 6 Taunt. 440. 442.

(2) 37 Geo. 3. c. 73. s. 5.

forced; the consequences of not producing it, or of goods being imported without a manifest, or of the manifest not agreeing with the report. The master of a vessel importing goods may be required, when he arrives *within four leagues* of the coast, to produce his manifest to any officer of customs that first comes on board, for his examination, and is bound to deliver to the officer a true copy, (which must be provided and subscribed by the master); the officer to whom the original manifest has been so produced will certify the production on the back, together with the day and year on which it was produced and the copy delivered to him; and will also certify on the back of the copy the day and year on which that was produced, and must forthwith transmit the copy to the respective collectors and controllers of the ports to which the goods are stated in the manifest to be consigned. The master must also in like manner produce the manifest to the officer who comes on board the vessel upon her arrival *within the limits of any port* of Great Britain in which the cargo or any part of it is intended to be discharged, and must also deliver to him a true copy, which is also to be provided and subscribed by the master: the production of which manifest and the delivery of the copy must also be certified to have been so produced and delivered by the officer of customs who first comes on board the vessel on her arrival within the limits of any such port, upon the back of the original manifest, with the particular day and year and the time when it was produced to the officer and when he received the copy; and the officer is also required forthwith to transmit the copy of the manifest to the collector and controller of the port. The statute, however, does not require of the master more than the delivery of one copy of the manifest to the officer who first comes on board within four leagues of the coast, and not to any other who may afterwards come on board within that distance; and the delivery of one other copy to the officer that may first come on board within the limits of a port, and not to any other who may afterwards come on board within those limits, if the master can produce to such officer his manifest, with a certificate on the back; provided that if the manifest which is required to be delivered up to the collector and controller of the port where the vessel arrives, contains an account of goods not to be landed there, but consigned to some other place in Great Britain, the collector and controller must certify upon the manifest, under their hands, such part of the cargo as shall there have been delivered, and shall then deliver back the original manifest to the

Production of Manifest.

Production of Manifest.

master of the vessel, and so in like manner as often as the case shall require, until the vessel arrives at her last place of discharge (1). If the master of a ship which is bound, with her cargo, to any place in Great Britain, do not, upon his arrival within the limits of a port, or within four leagues of the coast, produce the manifest to the officer of customs on demand, and give a copy to the officer who first comes on board, or do not give an account of the destination of the vessel, or if he give a false account in order to evade the production of the manifest, he will forfeit a sum equal to double the value of the goods, together with the full duties payable on them; and if the officer first coming on board shall neglect or refuse to certify on the back of the manifest that the same has been produced and the copy delivered, he will forfeit the sum of £100. (2)

Consequences of Import without Manifest.

The master of the vessel is the person on whom the law imposes the duty of being possessed of the manifest. If any goods be imported in a British ship without a manifest, or not described in the manifest, or not agreeing with it; or if wine be imported by any such vessel without a manifest verified as required by law; the master is liable to forfeit a sum of money equal to double the value of the goods, together with the full duties payable on the same (3). But these penalties are repealed with respect to goods coming from a place within the limits of the charter of the East India company, by the statute 54 Geo. 3. c. 36. s. 13.; and by another section of the act, goods from such a place without a manifest are forfeited, and may be seized by the officers of the customs, notwithstanding the goods may have been included in the report of the ship, and the master is liable to forfeit the sum of £50 for every package so imported. (4)

The master of a vessel importing goods must make an entry or *report* (5) on oath at the custom-house; and he is liable to penalties if the manifest should not agree with his report. The statute 26 Geo. 3. c. 40. provides that the master of a vessel in which goods shall be imported as directed by the act, shall, within 24 hours after the arrival of the vessel at such places as shall be appointed for that purpose by the commissioners of customs in England or Scotland, make entry upon oath of the built, burthen, contents, and lading of the vessel, with the particular

(1) 26 Geo. 3. c. 40. s. 6.

(2) 26 Geo. 3. c. 40. s. 7.; and see Faith v. Pearson, 6 Taunt. 440. 442.

(3) 26 Geo. 3. c. 40. s. 5.

(4) 54 Geo. 3. c. 36. s. 12.

(5) See as to this report and entry, post, 738, &c.

marks, numbers, and contents of every parcel of goods then laden on board, to the best of his knowledge and belief, and do and perform every act and thing in relation thereto before the customer, collector, or other chief officer of customs of the port, openly in the custom-house at the port, in the manner directed and required by the 13 & 14 Car. 2. c. 11. (1), under the penalty of £100. And when the master so makes his report or entry upon oath at the custom-house, he must deliver the manifest to the collector or other chief officer of the customs, under the penalty of £200. If a package which has been reported by the master is wanting, and not found on board the ship in conformity to the report; or if the goods reported do not agree with the manifest; or if either the report or manifest does not agree with the cargo found on board; the master is liable to forfeit £200. But when the goods are imported without a manifest, or when the manifest does not agree with the report, or is defaced or incorrect, or does not agree with the goods on board, the penalties will not be incurred, if it can be made to appear to the satisfaction of the commissioners of the customs that the cargo imported was wholly taken on board in foreign parts (the particular places being named), and that no part of the cargo has been unshipped since it was taken on board, and that the manifest has been lost or mislaid without fraud or collusion, or that it was defaced by accident, or incorrect by mistake: provided, that when any goods are taken on board in a foreign port destined to Great Britain, after the manifest has been attested as directed by the 26 Geo. 3. the master shall make out and sign a *separate manifest* of all such goods as shall be taken on board; which manifest will be subject to every provision contained in the act which the regular attested manifest is subject to; and the penalties inflicted by the act will not be incurred, if the urgent necessity of taking the goods on board is established to the satisfaction of the commissioners of the customs. (2)

Report on Manifest.

The manifest on *exportation* appears to be of older date than that required on importation. The statute 13 & 14 Car. 2. c. 11. provides, that before the master shall depart with his vessel out of port, he shall deliver to the customer, or collector and con-

Of the Manifest on Exportation. (3)

(1) 26 Geo. 3. c. 40. s. 11.

(2) 26 Geo. 3. c. 40. s. 12. and see s. 13. Penalty for masters allowing goods to be thrown overboard after production of manifest, or within four leagues of the coast. Pope, tit. 9.

(3) See division of the subject, ante, 692. 725.

Manifest on Exportation.

troller, a *content* in writing under his hand, of the names of every merchant and other person who shall have laden any goods on board, with the marks and number of the merchandize; and shall publicly in the open custom-house answer upon oath all such questions as shall be put to him concerning the goods, under a penalty of £100 (1). And a statute of the 17 Geo. 3. c. 41. requires that when any British or Irish vessel shall sail from Great Britain or Ireland, or any other part of his majesty's dominions, to any port in the *Baltic* for which a British consul is appointed, the master shall deliver to the consul or his deputy, within ten days after his arrival, a true manifest in writing, upon oath, specifying the particulars of the whole vessel, with the marks and numbers of packages, if delivered there, or of such part as shall be delivered, together with the name of the consignee; and if the manifest be not delivered, the consul is authorized to detain the clearance outwards of the vessel, and not to deliver any passport, dispatch, or bill of health for such vessel (2). Ships sailing to the ports of Denmark, Norway, and Archangel, and their dependencies, are now under the operation of the same laws as those which formerly regulated the manifests of ships trading to the Baltic (3). Masters of British vessels trading to or from places in the Portuguese dominions in South America, and unloading or delivering the vessel or any part of the cargo there, are required, within 48 days after the arrival of the vessel, to deliver to the consuls, or persons authorized by them for that purpose, a true manifest in writing, upon oath, specifying the particulars of the whole cargo of the vessel so to be unloaded or delivered, or of such part as shall be unloaded or delivered there, and to whom consigned; and likewise 24 hours before the masters deliver the outward clearance or passports for their vessels, they shall deliver to the consuls a true manifest in writing upon oath, specifying the particulars of the cargo laden there, which oath the consul is required to administer gratis upon request. (4)

4thly, The Master's Report and Merchant's Entry. (5)

The *master's report*, or, as it is sometimes called, the master's entry, and the *entry* made by *the merchant*, being extremely analogous to each other, may be conveniently considered together. On importation, the master's report precedes the merchant's entry; but when an exportation takes place, the mer-

(1) 13 & 14 Car. 2. c. 11. s. 3. Carruthers v. Gray, 15 East, 35.

(2) 17 Geo. 3. c. 41. s. 3.

(3) 18 Geo. 3. c. 46. s. 2.

(4) 54 Geo. 3. c. 126. s. 3.

(5) See division of the subject, 692, &c. 725.

chant's entry of the cargo is, generally speaking, the first step in order of time. The master may also be required to make a report when the ship arrives or departs in ballast. We shall therefore consider, 1st, the master's report with regard to a ship in ballast: 2dly, the master's report *inwards* when he arrives with a cargo, and the merchant's entry in that case: 3dly, the master's report outwards, and the merchant's entry: 4thly, those provisions that are the same with regard to the entry on importation and on exportation: 5thly, the mode of correcting an error in the master's report; the practice with regard to prime and post entries; the method of procuring the duties to be returned when an over-entry has been made, and of changing the vessel in which they are to be conveyed, by means of a transfer entry: 6thly, the mode in which the provisions for making the entry at the custom house, and the master's reports, are enforced by the legislature, and the penal consequences attached to not making a due entry.

The Master's Report, and Merchant's Entry.

1. The report of the master of a vessel arriving or departing in *ballast* is required by the statute 24 Geo. 3. sess. 2. c. 47. It directs that the master of every vessel arriving in this kingdom or going outwards in ballast shall, if called upon by the collector or comptroller or other proper officer of customs, make a just and true report of such vessel both inwards and outwards, and answer upon oath to such questions relative to the voyage and navigation of the vessel as shall be put to him by the officer at the port, harbour, or creek where he shall arrive, or from which he shall depart, under a penalty of £100. But no fees are to be exacted on account of this report. (1)

Report of Ship in Ballast.

2. When the master arrives with a cargo, he must proceed to the custom-house, and make his report on oath (2). The practice is said to be for the ship's broker, when the vessel arrives in the river, to take an exact account of her loading from the captain's manifest, and report it at the custom-house, which he does by making two copies, the one on a blank sheet of paper, and the other on a paper, with the oath to be taken by the master of the ship printed on it, given by the clerk of the ships' entries at the custom-house. The collector inwards, or his deputy, who, it is said, attends in the Long Room, administers the oath to the master in a prescribed form (3). The

Master's Report of Cargo Inwards.

(1) 24 Geo. 3. sess. 2. c. 47. s. 26. Montef. Dict. Com. tit. Customs, Inwards. Postlethw. tit. Prac. Bus. of custom-house, placed at the end of letter A.

(2) 1 Eliz. c. 11. cited infra.

(3) See forms, post Appen.

The Master's Report, and Merchant's Entry.

broker, after correctly copying the manifest on these two sheets of paper, goes to the bench officers in the Long Room in company with the master, and reads the two manifests over with him; the master retains that which is written on the plain sheet, and the other with the printed oath must be returned to the clerk of the ships' entries, from whom it was received. The master is then examined by the clerk concerning the ship, and the manifest is sworn to; a copy is taken by the assistant clerk of the ship's entries, who, it is said, attends the board with his parchment book, in which are inserted the names of the ship and master, and the country from which it came, in order that the commissioners may appoint such a landing waiter to the ship as the contents of the cargo may require (1). The master's duty in making the report is imposed upon him by various statutes. The statute 1 Eliz. c. 11. prescribes that no owner, master, purser, or other person taking charge of any crayer, vessel, or bottom, wherein any goods (2) shall be laden or brought from parts beyond the sea, or the realm of Scotland, shall discharge into any lighter or bottom, and lay on land any goods whatever, before he has signified and declared to the customer or other officer of the port, haven, or creek at which he shall arrive, the names of every of the merchants or laders, and shall have truly answered to such questions and interrogatories touching the goods laden on board, as shall be administered to him by the customer or other officer openly in the custom-house, or in such other place as aforesaid, upon his oath, if it shall be required; and in default of his complying with this regulation, he is liable to a penalty of £100 (3). An officer belonging to the custom-house, who becomes acquainted with an infringement of this statute, and conceals it, is liable to a penalty of £100. (4) The next statute which imposes on the master the obligation of making an entry on importation, is the 13 & 14 Car. 2. c. 11., which requires that no vessel arriving from foreign parts shall be above three days coming from Gravesend to her place of discharge in the Thames, without touching or staying at any wharf, quay, or place adjoining to either shore between Gravesend and Chester's Key, unless apparently hindered by contrary winds, draught of water, or other just im-

(1) Montefiori, Dict. Com. tit. Customs, Inwards. Rather more is stated in the text than relates peculiarly to the report, that the practical part of the business might be better explained by exhibiting a connected view.

(2) Except fish and salt.

(3) And see 26 Geo. 3. c. 40. s. 11. & 14.

(4) 1 Eliz. c. 11. s. 7.

pediment, to be allowed by one of the principal officers of the customs; and when she arrives, the master or purser must make an entry upon oath of the burthen, contents, and lading of the ship, with the marks, numbers, qualities, and contents of every parcel of goods, to the best of his knowledge; and must also declare where the ship took in her lading, in what country she was built, how manned, and who was the master during the voyage, and who are the owners, under the penalty of £100. (1) A similar duty is also imposed on the master by the 36 G. 3. c. 40. s. 11., which requires him to make the report within 24 hours. The master of a *ship of war* also, in which goods are imported, is bound not to allow them to be unloaded before he has declared in writing under his hand to the proper officer of the customs, the names of every merchant or importer, and the number and marks, and quantity and quality of every parcel of goods, to the best of his knowledge, and has answered on oath to such questions as shall be put to him in the open custom-house; and the masters of such vessels will be liable to all searches and other rules which merchant ships are subject to by the usage of his majesty's custom-house (except victualling bills and entering), under a penalty of £100; and upon refusing to make such entries, as well outwards as inwards, the officers of customs may go on board every such ship of war, and bring into his majesty's storehouse all prohibited or uncustomed goods which may be found on board the ship. (2)

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The *importer*, or the owner or consignee of the goods, is required by the 26 Geo. 3. c. 40. (an act to which we formerly referred in considering the laws relating to the manifest) within twenty days after the master has made *his* report or entry upon oath, in the manner directed by the act (3), or after the expiration of the time within which he is required by law to do so, make a due entry in writing in the usual manner, with the collector or other officer of customs, of all the goods imported by him, and pay the duties in ready money within that time. In default of payment, the goods are to be conveyed to the king's warehouse at the custom-house; and after three months have elapsed without their being paid for, they may be sold. But this provision

Merchant's Entry Inwards.

(1) 13 & 14 Car. 2. c. 11. s. 2; and see also 26 Geo. 3. c. 30. s. 14. ante, 731. as to manifest. As to ships from Ireland entering creeks, see 55 Geo. 3. c. 118. 56 Geo. 3. c. 93.

(2) 13 & 14 Car. 2. c. 11. s. 3.

(3) Vide ante, 731. where see provision as to report agreeing with manifest; and see 5 Geo. 3. c. 43. s. 1.

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will not authorize the sale of goods which may be lawfully entered and warehoused on a bond being given for payment of the duties. (1)

All goods imported into Great Britain, and intended to be landed, (except diamonds and bullion, and fresh fish, British taken, and imported in British vessels; and also except turbots and lobsters, however taken or imported;) whether they are liable to duty or not, must be regularly *entered* at the custom-house, and landed in the presence of the proper officers (2), who are required to examine them, and not deliver them out of their custody until they have taken a particular account of the quantity and species of the goods (3). Pearls, emeralds, rubies, and all other precious stones and jewels (except diamonds), are comprehended in this law, and must be regularly entered at the custom-house and landed in the presence of the proper officer, in like manner as any other goods on which custom duties are granted (4). The merchant is allowed to enter and land his goods at any time within 20 days from the day of the master's report (5); but he is generally interested in making an early entry, as delay renders him liable to the payment of demurrage. He enters the goods from his bill of lading. The proper course is said to be for the merchant to make out and sign six bills of entry, as there are six checks, and a bill is given to every check; and where there is a scavage duty there must be eight bills (6). One must be written in words at length, and is called the warrant; in the other bills the contents may be expressed in figures. They are all delivered to the collector; and when the customs have been paid to him, the entry is read out with the warrant; which warrant, it is said (7), is taken from the clerk of the warrants by the landing waiter appointed to the ship, who signs an order for the delivery of the goods.

Exportation Report and Entry.

3. The regulations with respect to the report and entry on exportation, are very similar to those to be observed on importa-

(1) 26 Geo. 3. c. 40. s. 14. 12 Ann. stat. 2. c. 8. s. 12.

(2) See further as to landing, post, 762.

(3) 27 Geo. 3. c. 13. s. 12.

(4) 43 Geo. 3. c. 68. s. 3.

(5) 26 Geo. 3. c. 40. s. 14.

(6) Montef. tit. Custom House. In Postlethwaite, Dict. Com. five bills are spoken of. See tit. Business of Custom House placed at the end of letter A., and continued through the dictionary at the end of the letters.

(7) Montefiori, Dict. Com.; and see Postlethwaite, ut supra. The forms of entry are there given.

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tion (1); and in many instances, the provisions with respect to both are contained in the same clause. After mentioning the enactments with regard to exportation in particular, we shall proceed to state those provisions which are framed in terms that apply equally to importation and exportation. The statute 13 & 14 Car. 2. c. 11. enacts, that no master of a vessel, bound *for parts beyond the sea*, or for Scotland, shall take any goods on board until he has entered the ship in the book of the commissioners or controller of the port where he so takes them in; together with the name of the master, the burthen of the vessel, the number of her guns and ammunition, and the place to which she is about to sail. Previously to his departure, the same statute requires that he shall deliver to the customer, a written content of the names of every merchant and other person who may have laden goods on board; and also the marks and numbers of the goods (2). He must also answer upon oath all questions put to him about the goods; and in default of his complying with these regulations, he is liable to a penalty of £100 (3). In the valuable collection of the laws of customs and excise which has been lately published, a list is given of the goods of the production or manufacture of the united kingdom which are usually exported from Great Britain, and this table shows how such articles should be entered at the custom-house on exportation, and indorsed on the proper documents. In making the entry, Irish produce and manufactures ought to be specially distinguished (4). The statute 8 Geo. 1. c. 15. s. 9. also re-

(1) See Montef. Dict. Com. tit. Customs, Outwards. When the goods are ready, the bill of entry, which is a description of them, with the name of the ship, captain, and merchant, is taken to the custom-house. There must be five or six bills of entry; and when the duties have been paid, a *cocket* is delivered certifying that fact, &c. The cocket is to be delivered to the searcher, who must have notice of the shipment; see post. The searcher will attend, and examine and count or weigh, &c. the goods, which being done, they are put on board, and the searcher certifies the quantity shipped on the back of the cocket, which is then returned to the principal officers, with whom it remains till the master comes to clear. When the master comes, the cockets for all the goods on board are collected and entered in what is called a report outwards, upon the master's declaring the cockets to contain a true account of his whole cargo. To this report the master makes oath before the collector and controller, pays his clearing charge, his cockets are delivered, and he is at liberty to proceed on his voyage. Postlethwaite, at the end of letter A. Montef. tit. Customs, Inwards.

(2) See as to the manifest, ante, 737.

(3) 13 & 14 Car. 2. c. 11. s. 3; and see before this act 1 Eliz. c. 11. s. 4. which is still in force. Carruthers v. Gray, 15 East, 35.

(4) Pope, tit. 286.

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cognizes the necessity for an entry on exportation. It provides that it shall be lawful for any person to export out of a port in which there is a customer or collector, all such goods of the produce or manufacture of Great Britain as may now be lawfully exported, without paying any subsidy or duty (except for the goods which are especially provided for by the act) (1), "so as a due *entry* be first made of the goods in the custom-house where the same shall be exported, in the same manner and form expressing the quantities and qualities of the goods as was practised before the making of the act, and so as the same be shipped by the proper officer for that purpose; in default of a compliance with this regulation, the act declared that the goods should be liable to the payment of the ancient duties" (2). If, after the master has cleared outwards, he should take in any more goods, they must be added to the report underneath the former goods; then the report must be sworn *de novo*, and the particular day should be inserted under that on which it was sworn to before. When it happens that the ship takes in goods for different places, they should be particularly distinguished in the report (3). But the circumstance of a packer having, after the captain had obtained his manifest and clearances at the custom-house, put on board the ship some bales of goods, and of a second clearance not having been made, will not invalidate a policy of insurance on goods where the loss was not attributable to that omission. (4)

Export and Import Entry.

4. The statute 13 & 14 Car. 2. c. 11. contains a clause — the principal object of which was to prevent frauds in covering aliens' goods, and others that might be committed if imperfect entries were allowed—providing that (5) every merchant or other person passing any goods *inwards or outwards*, shall, either by himself or his known servant, factor, or agent, subscribe one of his bills of every entry with the mark, number, and contents of every parcel of such goods as are rated to pay by the piece or measure, and the weight of the whole parcel of such goods as are rated to pay by weight; without which, the officers of cus-

(1) The duties now payable are contained in the 59 Geo. 3. c. 52.

(2) 8 Geo. 1. c. 15. s. 9.

(3) Pope, tit. 10. reg. 41. note a. The oath that the duties have been paid, and the certificates on export of excise goods, must be administered and granted gratis, 5 Geo. 3. c. 13. s. 37.

(4) Carruthers v. Gray, 15 East, 35.

(5) 13 & 14 Car. 2. c. 11. s. 3. The entries and debentures of drawback goods, &c. must be in name of real owner. 26 Geo. 3. c. 40. Pope, tit. 10. reg. 52. and see 5 Geo. 3. c. 43. s. 1.

toms are not to allow any entry to pass; and this provision is enforced with respect to the marks and numbers on hogsheads of sugar imported from the West Indies, by an order of the board of customs of the 4th Dec. 1813 (1). And if the goods be entered under a wrong denomination, as wrought leather instead of undressed leather, they are liable to forfeiture (2). Every merchant or other person passing goods either inwards or outwards, must also, either by himself or his known agent, subscribe one or more bills of entry, stating whether the goods are on alien or British account; and if required, make oath of the same before the officer appointed to receive the duties, who is authorized to administer it by the charter granted to the city; and no entry on alien account will be allowed to pass, nor will the goods be delivered, unless the signature or mark of the city's collector, or his deputy, appears on the face of the warrant. If goods which are bonâ fide alien's property are entered as on British account, the person making the entry is liable to a penalty of £100 (3). If a merchant or other person enters goods for a foreign place, in order to obtain a drawback by carrying the goods to the British colonies, when no drawback is payable on such an exportation, and the goods are actually exported to and landed in the colonies, the exporter and master will forfeit double the amount of the drawback, and treble the value of the goods. (4)

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5. If the master's report contains an erroneous statement, and no fraud was intended, an amendment may sometimes be made in it. Where an error is discovered on the day on which the report was made, and before any seizure or detention has taken place, it has long been a regulation at the custom-house that the collector and controller, on being satisfied that no fraud was intended, shall allow the report to be amended (5). The statute 59 Geo. 3. c. 123. also provides that where any goods have been omitted in such reports, or where they have been wrongly described, or where the reports are incorrect in any other respect, the commissioners of customs, after satisfactory proof by the oath of the master and mate, or purser, and the production and inspection of the original log-book and cargo-book of the vessel

Correction of Error in Report.

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(1) 13 & 14 Car. 2. c. 11. s. 10. Pope, tit. 9. reg. 3. ante, 732. as to manifests.

(2) Shields v. Blackburn, 1 Hen. Bla. 158.

(3) 24 Geo. 3. c. 16. s. 3.

(4) 4 Geo. 3. c. 15. s. 16.

(5) Pope, tit. 9. reg. 4. note c: Order of board of customs, 29th November 1817.

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for that voyage, and other original documents and bills of lading, when there are any, and after being satisfied that no fraud was intended, may grant permission to the master to make and amend the reports on oath before the proper officers of the customs, the order for the amendment specifying that the proof and inspection have duly taken place; and the master will be liable to the like penalties when he makes a false amendment, as he would have been before the act when he made a false report (1). The collector and controller of customs at the out-ports are also empowered to make a similar order, to authorize the master of a ship, when he has made a false or incorrect report, to amend it, on similar proof being adduced; but no such alteration can be effectually made, if made *after* the actual seizure of any goods as forfeited for not being reported as required by law, or after the actual commencement of any prosecution against the master for a penalty incurred on the ground of the goods not being included and described in the original report of the cargo, or not being duly landed according to the report. (2)

Prime and post Entries.

The inability of the merchant at the time when he makes his entry on importation, to calculate exactly the duties which he is liable to pay, gave rise to the practice of allowing *post* entries to be made after the goods have been weighed, measured, or gauged, to make up a deficiency in the original or *prime* entry (3). The ancient usage at the custom-house, to allow prime and post entries to be made in certain cases, seems to have been recognized by the legislature in the stat. 12 Car. 2. c. 4.; and when a land-waiter in the port of London refused to grant his order to the officer for the delivery of casks of brandy, which was necessary in order to have them gauged, and the post entry made, and the brandy cleared, after the merchant had made his prime entry and obtained a warrant from the collector for landing the brandy, and delivered it to the land-waiter, the latter was holden liable to an action, at the suit of the merchant. (4)

Of Return of Duties on Over-Entry, and of Transfer Entry.

When a return of duties is claimed on British goods for exportation, where the goods are in part or in the whole not

(1) 59 G. 3. c. 123. s. 1. Pope, 10. reg. 22. note a.

(2) 59 Geo. 3. c. 123. s. 2.

(3) See Montefiore, tit. Customs, where it is also said that prime and post entries are not to be allowed on some goods, as linen, chip hats, &c.; and in wines the merchant makes his prime and post in one entry, id. ibid. Vide Timson v. Nodin, 2 Bla. Rep. 963.

(4) Timson v. Nodin, 2 Bla. Rep. 963.

shipped, the following rules must be observed. The merchant is required, first, to make a due entry of the goods and take out a cocket (1); and deliver a bill to authorize the shipping, on which he is to indorse the quantity intended to be shipped; and afterwards, the searcher is to certify the quantity that is actually shipped, and keep a regular account of it. When any specific articles are entered for exportation in a particular ship, and cleared and water-borne, but are afterwards from circumstances prevented from being shipped and proceeded with on the voyage, they are allowed to be shipped duty free, by a *transfer entry* in a prescribed form, if the rate of duty to the intended place is equal, or if not, upon payment of the difference. Where the goods have not been cleared or water-borne, the practice of making *over-entry* certificates outwards has been lately discontinued, and instead of them, applications are now made by the parties to the board of customs for a return of duty under such circumstances, in order that, if it be allowable, it may be done by special certificate, according to the practice of the port of London (2). When the transfer entry is passed, the original cocket is produced, the particulars of the goods to be transferred being indorsed upon it; and a verbal oath is made, that no use shall be made of the first cocket, except uniformity with the indorsement. The production of the first cocket confines the transfer entry to recent transactions. (3)

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6. The mode in which the provisions for making the entry at the custom-house and the master's report are enforced, and the penal consequences attached to not making a due entry, are next to be considered. First, it is lawful for any searcher or other proper officer of the customs, after the entry of certain goods, and *before or after* the shipment of them, to open and strictly examine any package, to see if the goods are rightly entered, and if upon examination they are found to be rightly entered; the searcher or other officer must, at his own charge, cause them to be repacked, which charge may be allowed to the officer by the commissioners of the customs, if they think it reasonable; but if the officer shall, on examination, find the goods to be less in quantity or value

Consequences of not making Report and Entry.

(1) As to this, see post, 760.

(2) Order of board of customs, 14th November 1816. Pope, 10. reg. 41. note a.

(3) Order of board of customs, 14th November 1816. Pope, tit. 10. See fully as to the over-entry inwards, Montef. Dict. Com. tit. Customs, Inwards; and Postleth. Dict. Com. at end of letter A.; in which books the whole proceedings as to entry are very minutely detailed.

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than is expressed in the exporter's indorsement upon his entry, or entered under a wrong denomination, by which his majesty would have been defrauded, the goods may be seized, and the owner will lose the benefit of the drawback or bounty, as well as the value of the goods (1). But this provision, as explained by the preamble, which seems to be incorporated by reference in the body of the act, only applies to the "prevention of frauds in entering, for exportation, goods upon which a drawback, bounty, or premium is payable, and goods prohibited to be worn or used here, and pepper." However, when the master has reported any packages for exportation, it is lawful for the officers of customs to open the packages on board the vessel so reported, and examine the contents, or (when necessary) to bring them on shore to his majesty's warehouse for the port where the report is made, without subjecting themselves to any action or prosecution. But this regulation does not extend to a vessel coming from a port of Asia, Africa, or America (2). The stat. 27 Geo. 3. c. 32. is the act which contains this provision, though it had before been applied to cases where the master's report did not specify the particulars of the packages, and where he made his report "contents unknown" (3). The stat. 24 Geo. 3. c. 47., which contained the old provision, recited the illegalities committed by vessels trading with Europe as the mischief it was intended to remedy; but as it did not, like the 27 Geo. 3., contain an express exception of Asia, Africa, and America, and the enacting part was general, it has been considered by the board of customs, that it applies to goods imported from any foreign parts, whether in or out of Europe (4). The 24 Geo. 3 goes on to provide, that if it shall appear, on examination, that the bales, the contents of which have been reported unknown, contain any goods which are prohibited to be imported, or which are liable to forfeiture on being imported, the goods and package will be forfeited; and when the goods are not prohibited, they will be chargeable with the legal duties, and will not be allowed to be exported, or delivered for that purpose, before the duties have been regularly paid, without the leave of the commissioners of the customs; and all goods found on board a ship which has not been reported by the master will be for-

(1) 12 Geo. 1. c. 28. s. 17. See also 13 & 14 Car. 2. c. 11. s. 4. 5 Geo. 3. c. 43.

(2) 27 Geo. 3. c. 32. s. 10. Penalty on master's opening or altering packages without leave. 5 Geo. 1. c. 11. s. 7.

(3) 24 Geo. 3. c. 47. s. 28.

(4) Pope, tit. 9. note a.

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feited (1). All goods which are found concealed in false bulk-heads, between the linings and false knees, or in concealed lockers, or in any other place on board a vessel, at any time after the master has made his report at the custom-house, and which are not comprized or mentioned in the report, will be forfeited, and the master of the vessel, if it should be made to appear that he was any ways consenting to the fraud or concealment, will forfeit treble the value of the goods (2). The officers of excise have also a power to go on board a vessel which is within the limits of any of the ports of this kingdom, and to continue on board and rummage and search, in like manner as the officers of customs may do, for all exciseable liquors, and for all coffee, tea, cocoa nuts, chocolate, and cocoa paste, and to seize goods which are forfeited by law; and also to seize such of these commodities as may be found unshipping or unshipped without entry and payment of the duties (3). If any raisins, nutmegs, cinnamon, cloves, mace, and snuff, which are charged or intended to be charged with duty, be landed or put on shore out of the ship before they have been duly entered at the custom-house at the port of importation, and before the duties have been paid, or without a warrant for the delivery, signed by the collector or other proper officer of the customs, the goods may be seized or recovered by law, one moiety to the use of the queen, and the other to the informer (4). A statute was passed in the reign of Charles 2. to provide for the seizure of goods which are landed without being entered; it enacts, that if any person shall cause goods for which custom or other duties are due and payable to be landed or conveyed away without due entry thereof first made, and the customer or collector or his deputy agreed with, then upon oath made before the lord treasurer or any of the barons of the exchequer, or chief magistrate of the place where the offence is committed, or the place next adjoining thereto, it will be lawful for the lord treasurer, barons, or magistrate to issue out a warrant to any person, thereby enabling him, with the assistance of a sheriff, justice of peace, and constable, to enter into any house in the day-time where such goods are suspected to be concealed, and in case of resistance to break open such houses, and to seize and secure the goods so concealed; and all

(1) 24 Geo. 3. c. 47. s. 28.

(2) 9 Geo. 2. c. 35. s. 27. recites that such goods were not before forfeited, unless found after clearing; and see 5 Geo. 1. c. 11. s. 4. as to goods not reported, and found after clearing.

(3) 11 Geo. 1. c. 30. s. 1.

(4) 8 Ann. c. 7. s. 14. Pope, tit. 10. reg. 34.

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officers and ministers of justice are required by the statute to be aiding thereunto (1): provided always, that no house be entered by virtue of the act, unless it be within the space of one month after the offence supposed to be committed (2). The statute also provides, that if the information on which any house is searched should prove false, the party injured may recover his full damages and costs against the informer in an action of trespass. (3)

Of the Declaration of the *Value*.

The merchant, when he makes the entry, is frequently obliged to declare the *value* of the goods, because the duties on some species of merchandize are charged according to the value, and not, as is most usually the case, according to the weight, tale, gauge, or measure (4). The late consolidation act prescribes the rule to be adopted in *fixing the value*. It provides, that where custom duties are imposed on importation or exportation according to the value, the value is to be taken as it happens to be at the port of importation or exportation, without any abatement or deduction, except of so much as the duties payable on the importation or exportation amount to; and the value is to be ascertained by the declaration of the importer, exporter, or proprietor of the goods so imported or exported, or of his known agent or factor, in the same manner and form, and under all the same rules and provisions with respect to the declaration, as were prescribed by any acts of parliament in force in Great Britain immediately before the 5th of July 1819; and when any goods are not valued according to the real value, and according to the true intent and meaning of the statutes, the officers of the customs may cause them to be detained, and may proceed in the same manner as those acts of parliament required (5). The exporter of British salt exported from Great Britain is allowed to deduct from the value of the salt the amount of the home consumption duty of excise paid or payable thereon, at the time of the entry of the salt for the purpose of being exported, and the value so ascertained is deemed the real value of the salt at the port of exportation (6). The ancient provisions for ascertaining the ad valorem duties required the importer or exporter, or his known agent or factor, to *declare* the value of the goods im-

Rules for fixing the Value.

Mode of declaring the Value.

(1) 12 Car. 2. c. 19. s. 1. perpetual by 3 Geo. 1. c. 7.
(2) 12 Car. 2. c. 19. s. 2.
(3) 12 Car. 2. c. 19. s. 4.
(4) See Montefiori, tit. Customs, Inwards; and Postlethw. tit. Prac. Bus. of C. H. (printed at the end of letter A.)
(5) 59 Geo. 3. c. 52. s. 29.
(6) 54 Geo. 3. c. 50.

ported or exported in the presence of the principal officers of customs, whose duty it afterwards was to certify the value stated. But these regulations have been rescinded (1). The statute 54 Geo. 3. c. 122. provides that where the value of goods subject to a custom duty on importation or exportation is required to be ascertained by the declaration of the merchant (2), the value is to be specified in words at length upon the warrant or bill of entry, and attested by the merchant's signature. This specification is of the same effect as the declaration anciently required to be made before the officers of customs; and when the goods are undervalued, they may be dealt with as they anciently might in the same case (3). The declaration of value before the principal officers continues to be required when the real value of the goods cannot be ascertained at the time of entry (4), and the following method is then adopted for securing payment of the duty: where a merchant importing goods is unable to make an entry without their being landed and examined, he must make oath that he is unable to ascertain the real value, and will then be at liberty to make a deposit sufficient to secure the additional duties; and the 42 Geo. 3. c. 43. provides that the value of the goods shall be ascertained with convenient speed after the examination by the declaration of the merchant in the manner directed by the act, and the duties must be paid before the delivery of the goods. When the value cannot be ascertained, after examination, so as to enable the owner to make an entry according to the real value, and the commissioners of customs are satisfied of that fact, the goods may be delivered after payment of the duties charged by any former act, for the purpose of being publicly sold, such deposit being made as we have just mentioned; and the entry of the goods may in that case be completed within seven days after the sale, and the additional duties will be paid upon the value, according to the price at which the goods have been publicly sold, without any abatement or deduction, except of so much as the duties payable on importation amount to; such price being ascertained by the oath of the merchant, before the collector or

Of the Declaration of Value.

(1) 54 Geo. 3. c. 122. s. 1. preamble, and 27 Geo. 3. c. 13. s. 16. from which the history of the mode of declaring value may be collected.

(2) The words of the act are the importer or exporter, or his known agent or factor.

(3) Vide infra, 54 Geo. 3. c. 122. s. 1.

(4) 54 Geo. 3. c. 122. s. 1. refers to 49 Geo. 3. c. 98. s. 29., quod vide as to British goods exported.

Of the Declaration of Value.

controller of customs at the port of importation (1). A valuation is also required of the merchant on exporting goods of the produce of the United Kingdom, which are not subject to duty,—an obligation which is imposed upon him to supply government with the means of ascertaining the value of our export produce. The exporter of all goods of the growth, production, or manufacture of the United Kingdom, not subject to duty on exportation, must deliver to the searcher, or other proper officer of customs, a separate shipping bill, the indorsement of which is to contain a true and accurate specification of the quantity, quality, and value of the goods, the value being written in words at length, attested by the signature of the exporter or his agent; and such separate shipping bill, so indorsed, attested, and delivered, will have the same effect as the separate bill and declaration of the value before the principal officers formerly required with respect to the same subject by the stat. 53 Geo. 3. c. 98., and will be subject to the regulations in that act; and if the exporter of any such goods, or his known agent or factor, neglects to deliver the separate shipping bill so indorsed, or neglects to produce the invoice of bills of parcels, or knowingly makes any false specification or attestation of the value or contents of any such goods, either at the time of the first entry, or after they have been allowed to be shipped for exportation, he will forfeit £20.

Consequences of undervaluing.

3. An undervaluation of the property renders it liable to be seized by the officers of customs. When it appears to them, on examining the cargo, that the goods are not correctly valued, they are empowered to detain the property, and cause it to be conveyed into his majesty's warehouse, or otherwise properly secured at the port of importation, and to take it for the use of the crown, within eight days from the landing, when the goods have been imported (2) into London or Leith, and within 15 days when they have been imported into any other ports. And the commissioners of customs are empowered to direct the receiver general and cashier of his majesty's customs, when the goods have been imported into London, to pay out of any money in his hands arising from the revenue of customs, to the im-

(1) This provision is contained in 42 Geo. 3. c. 43. s. 3. But though the custom duties have been three times consolidated since this act, there is no such clause in the acts of parliament, Pope, tit. 12. reg. 4.

(2) And see as to exportation, 49 Geo. 3. c. 98. s. 37.

porter or proprietor of the goods, the value at which it had been estimated by him, together with an addition of £10 per cent. thereon (1); and also the duties paid on the importation of the goods; but without any further allowance, either on account of freight or any other charge or expense whatever; which payment will be made within 15 days after the goods have been taken, when they are of more than £20 value, and without delay, if the value of the goods does not exceed that sum; and when the goods have been taken and detained in any port besides London, the collector of customs in the port, with the privity of his controller, is authorized to make such payment out of any money in his hands arising from the custom duties (2). The payment so made to the merchant is to be in full satisfaction of all his claim, just as if the goods had been regularly sold as they formerly used to be (3); moreover, the commissioners are afterwards at liberty to cause the goods to be publicly and fairly disposed of to the best advantage; and where there is any overplus remaining from the produce of the sale, after deducting the value so ascertained, together with the addition of £10 per cent. thereon, and of the duties paid on importation, and also the charges arising from the warehousing and sale of the goods, the commissioners of customs may order one moiety of the overplus to be paid to the several officers of customs concerned in the examination of the goods, as an encouragement for the faithful discharge of their duty, and the other moiety of the overplus, together with the amount of the value of the goods so ascertained, with the addition of £10. per cent., and also the importation duties, is to be paid to the collector of customs in the port in which the goods have been sold. But when it happens that the produce of the sale, after deducting the charges arising from the warehousing, securing, or sale of the goods, does not exceed the value of the goods so ascertained with the addition of £10 per cent., and of the duties paid on importation, then the whole produce of the sale of the goods, after deducting the charge arising from the warehousing, securing, and sale of the goods, is to be paid into the hands of the collector of customs in the port at which the goods have been sold (4). When British goods, not subject to duty, are exported, and the searchers or other proper officers of customs find, upon examination, that they

Of the Declaration of Value.

(1) But see now as to this addition, 49 Geo. 3. c. 98. s. 28. 59 Geo. 3. c. 52. s. 29. which enacts that the value shall be *paid* without any such *deduction*.

(2) 27 Geo. 3. c. 13. s. 17.

(3) 27 Geo. 3. c. 13. s. 18.

(4) 27 Geo. 3. c. 13. s. 18.

Of the Declaration of Value.

have not been correctly valued according to the price at the port of exportation, it is the duty of the officers to call for the production of the invoice and bills of parcels, or such other documents relating to the goods as they think necessary, in order to ascertain the real value; and the merchant is obliged to produce them. And if it should appear to the officers that any false valuation has taken place, the merchant is required by law to make a new declaration of the value conformably to the real value of the goods, and the officer may detain the goods until the new declaration has been made. Provided, however, that if at the time of making the exportation entry, the merchant is not able to ascertain the contents and the true value, the officers allow him to export the goods upon his previously making oath before the collector and controller of customs, that the real value and specification of the contents cannot then be ascertained; and that within three months from the date of entry, he will cause the separate bill and declaration required by the statute (1) to be delivered to the proper officers (2). When British goods not liable to duty are exported, and the merchant neglects to deliver the separate bill and declaration within the time required by law, or does not produce the invoice or bills of parcels of the goods, or knowingly makes a false declaration of the value or contents of the goods, either at the time of the first entry or after the shipment for exportation has been allowed, he is liable to forfeit the sum of £20 for each offence. (3)

Of the Bill of Sight. (4)

When a merchant is ignorant of the real quantities or qualities of any goods consigned to him from his correspondent, so that he is unable to make a perfect entry of them, he must acquaint the collector or controller with the circumstance, and desire a *bill of sight* or view, in order to have them brought on shore, and examined. And, upon the merchant's making oath, that he has received no advice from which the quality, quantity, or value of the goods can be ascertained, and depositing such sums of money in the collector's hands as may be conjectured to be sufficient to answer the amount of the duties, such a bill will be granted (5). In the granting of the bill of sight, as well as in the course to be pursued after it has been granted, several regula-

(1) See ante, 750, 1.

(2) 53 Geo. 3. c. 98. s. 2.

(3) 53 Geo. 3. c. 98. s. 3. The valuation of East India goods takes place under regulations similar to the others. See 53 Geo. 3. c. 155. s. 19. 59 Geo. 3. c. 52. s. 30 & 31.

(4) See division of the subject, ante, 692. 725.

(5) Montefiori, tit. Customs Inwards, and see preamble 5 Geo. 3. c. 43.

tions are to be attended to which have been adopted at the custom-house, as well as others which have been prescribed by the legislature. When the application is made by an agent or a clerk to an importer, it can only be acceded to upon production of the employer's authority for making it (1). The landing officers must also take care when a bill of sight is granted, that no more goods be suffered to be landed than the deposit on the bill of sight will; cover and they are required, by an order of the board of customs, to make an accurate and complete examination of the goods landed, by opening the packages and by turning out, when practicable, the contents of every package (2). The landing surveyors at the out-ports are also instructed to require, that within three days after the delivery of the goods and completing the sufferance at sight, the landing waiter shall make a due return of the bill to the collector, indorsed with the quantity of the goods delivered and signed by the landing surveyors and landing waiter, and require a perfect warrant from the collector the next day. Goods landed by bill of sight cannot be entered for warehousing before payment of the duty, unless it be expressed in such bill that the goods are to be so warehoused, if allowable; and the goods must be landed at the appointed quays. The statute 13 & 14 Car. 2. also provides, that all foreign goods which the custom-house officers allow to be landed and taken up by bills of sight, bills at view or sufferance, shall be landed at the most convenient quays or wharfs, where the persons appointed for managing the customs, or the customer, or collector, or controller shall appoint, and not elsewhere; and there, or in his majesty's storehouse belonging to the respective ports, at the election of the persons so to be appointed and the officers, shall be measured, weighed, and numbered by and in the presence of officers particularly appointed for the purpose (3). The officers so appointed must perfect the entry, and subscribe their names to it; and on the next day render an account and make report of every entry so perfected to the persons appointed for managing the customs, or the customer or collector and controller, unless reasonable cause to the contrary can be shown, and is allowed of by the officers. (4)

Of the Bill of Sight.

Goods imported which pay duties by tale, are to be tallied at the delivery at 1, 10, 20, &c., according to the nature of them,

Allowance for Tare and Damage, &c. (5)

(1) Order of Board of Customs, 6th Feb. 1818. Pope, tit. 10.

(2) Order of Board of Customs, 6th Feb. 1818.

(3) 13 & 14 Car. 2. c. 11. s. 21.

(4) Penalty £100. 13 & 14 Car. 2. c. 11. s. 21.

(5) See division of the subject, ante, 692. 725.

Allowances for Tare, Damage, &c.

and a post entry is very seldom allowed to be made on goods by tale (1). Goods paying duties by weight, are weighed at the king's beam. The practice, on the landing of the goods, is said to be for the weigher to call out the full and true gross weights in the scale, which the landing waiter and the ship's broker are to enter in their books, and from the total amount of the gross weight, an allowance is to be made in consideration of *draft*, according to certain weights settled by usage, except with regard to tobacco of the British plantations, which is allowed for at the rate of two pounds for every hogshead of 350lbs. or upwards; and after the allowance for draft is deducted, there is, in most cases, a further allowance to be made out of the remaining weight called *tare*, in consideration of the outside packages, such as chests, casks, bands, paper, thread, &c. Several sorts of goods have their tare ascertained; and then, it is said, the appointed tares must not be altered or deviated from in any case within the port of London, unless it be the desire of the merchant or of the officers that the goods should be unpacked, and the net weight taken: and in London, the consent of two landing surveyors must be obtained and attested by their signatures in the landing waiter's books; and in the out-ports, the consent of the collector and surveyor. Goods which have not their tares ascertained, are allowed for according to the adjustment of two landing-surveyors in London, and of the collector and surveyor in the out-ports (2). By an order of the board of treasury, dated the 30th of March 1816, the customary tare then subsisting on currants was abolished, and the following rates were substituted, at which the tare on currants is to be allowed, viz. currants, in casks, from Zante, 13 per cent., from Leghorn, 10 per cent. and from Trieste 10 per cent.; with liberty, however, to the merchant and to the officers to have an actual taring when either of them shall be dissatisfied, in conformity to the general practice of allowing tares on all other goods (3). The West India dock act provides, that the directors, when they think fit, may cause to be emptied, in the presence of the custom landing waiter then on duty, any number of casks which they think proper, of the different sizes in each cargo of West India produce which is brought into the docks, the number so to be emptied not exceeding two casks of each size and description in each cargo, one of the two casks being selected by some proper of-

(1) Montef. tit. Customs Inwards.

(2) As to this method of allowing draft and tare, see Montefiori's Dict. Com. tit. Customs. Beawes, tit. Customs. 6 ed. 2 vol. 422.

(3) Order of the Board of Treas. 30th March 1816. Pope, 151. note b.

ficer of the company, and the other by the landing waiter, with respect to the size and description of the casks emptied. The directors may cause the cask so emptied to be weighed in the presence of the landing waiter, and an account to be taken in writing of their different weights; and the average weight of the two casks is to be considered as the average weight or standard by which the tares of the remainder of the casks of the same size and description in the cargo are to be computed; and it will be allowed accordingly, between the consigness of the West India produce and the officers of the revenue, in computing the net weight of the produce. (1)

Allowances for Tare, Damage, &c.

Where goods which have been shipped in foreign parts, are found to be *damaged* on their being about to be discharged from the importing vessel, the law in general authorizes a proportionate allowance to be made out of the duties of customs. But no allowance or abatement is ever made out of the duties imposed on currants, figs, or raisins, in respect of damage that such goods have received (3). The provisions that affect the allowance or return of duty in respect of damaged goods, relate either to the mode of proving that damage has been sustained, or to the mode of ascertaining the amount of it. Proof of the fact is required to be made by the joint affidavit of the importer or his agent, and the master of the vessel (4). The amount of the damage is in general ascertained by officers appointed for that purpose. But if the importer be dissatisfied with the officers allowance, or if the officers deem themselves incompetent to decide what exact portion of damage the goods may have sustained, they may call in two indifferent merchants, who are to decide it upon oath (5). When warehouse goods are imported, the allowance for damage must be claimed at the time they are first examined; and no allowance will be made for any goods whatever after they are taken out of the charge of the proper officers (6). The ordinary method is first to pay the duty, and afterwards to have the amount on the damage returned by a certificate. However, in one or two cases, when warehouse goods which were imported were found to be damaged, the amount of the damage was allowed to

Allowance for Damage in Voyage (2)

(1) 42 Geo. 3. c. 113. s. 20.
(2) Vide 12 Car. 2. c. 4. Hard. 360. Com. Dig. Trade, C. 3.
(3) 59 Geo. 3. c. 52. s. 34. 33 Geo. 3. c. 70.
(4) Pope, 13. and infra, under this head.
(5) 33 Geo. 3. c. 70. s. 5.
(6) 43 Geo. 3. c. 132. s. 12, Pope, 13.

Allowances for Tare, Damage, &c.

be written off from the account (1). The regulations made to prevent any undue allowances for damage in respect of imported goods are contained in the statutes 17 Geo. 3. c. 43. 27 Geo. 3. c. 13. 33 Geo. 3. c. 70. & 59 Geo. 3. c. 52. No abatement or allowance will be made in the duties for any goods whatever on account of damage they may have received, unless the importer or owner of them shall prove to the satisfaction of the commissioners of customs at London or Edinburgh, or to the collector and controller of customs at the outports, that the goods are damaged, and are lessened in their true value by means of some unavoidable accident which happened to them during the course of the voyage, after they were laden in foreign parts on board the importing vessel, and before they were landed in this kingdom (2). The attorney and solicitor general have given it as their opinion, that, according to the provisions of the law, the proof to be made by the parties, of the fact of damage having been sustained, must, if the goods are at an out-port, be adduced to the satisfaction of the collector and controller at that out-port, and that unless they are satisfied that some damage has been sustained, for which an allowance ought to be made, the inquiry can proceed no farther, and the claim must be disallowed (3). Whenever applications are made for allowances on goods, upon the grounds of their being increased in weight in consequence of having imbibed salt water, the surveyor and other proper officers must proceed immediately to ascertain it, and grant certificates of it, which are to be transmitted to the commissioners with all practicable dispatch, to receive their orders previously to the deduction being made, from the foot of the landing waiter's account (4). After the damage has been made out in proof, the quantum of damage becomes the next object of inquiry. The statute 33 Geo. 3. c. 70., in directing the mode of ascertaining the *amount* of the damage sustained, provides that it shall be lawful for the commissioners of customs in England and Scotland, to authorize such officers under their respective management as they shall judge proper, in the case of goods which have received damage, during the course of the voyage (the proof of such damage being first ascertained in the manner required by law), to examine the goods, and to certify what damage they have received, and how much they are lessened in their true value according to such damage in rela-

(1) See Postlethw. Dict. Com. at the end of letter A. Montefiori, tit. Customs, Inwards; but the modern practice is more accurately and ably detailed, Pope, tit. 13.

(2) 17 Geo. 3. c. 43. s. 3.

(3) Pope, tit. 13. reg. 1. note b.

(4) Pope, tit. 13. reg. 1. note b.

tion to the duties set upon them, and thereupon the commissioners shall direct a just, reasonable, and proportionable allowance to be made to the importer by way of return or repayment, out of the duties actually paid. But if the importer be not satisfied with the allowance so made, or if the officers authorized by the commissioners represent themselves incompetent to determine what will be a reasonable allowance in any particular case, another method is to be adopted for ascertaining the quantum of damage by the oaths of two indifferent merchants (1). The ascertainment of the damage, by calling in two merchants, was authorized by the stat. 27 Geo. 3. c. 13. and was the course always resorted to previously to the stat. 33 Geo. 3. c. 70., which contains the provision that has been just mentioned. The statute 27 Geo. 3. directs, that when any goods imported into Great Britain from foreign parts, and charged with specific duties, according to the weight, tale, gauge, or measure, (except wine, tobacco, raisins and currants), receive any damage by salt water or otherwise, during the course of the voyage, after the goods have been laden or shipped in foreign parts, and before they are unshipped or discharged from the vessel in which they are imported, so that the owner is prejudiced in the sale of the goods, the principal officers, or any two of them, whereof the collector for the time shall be one, shall have power to choose two indifferent merchants experienced in the value of such goods, who, upon viewing the same, shall certify and declare upon oath, what damage the goods have received, and how much they are lessened in their true value according to such damage, in relation to the duties set upon them; and thereupon the proper officers are authorized and required to make a just, reasonable, and proportionable allowance to the merchant, by way of return or repayment, out of the duties that have been actually paid (2). In the practice of the custom-house, sugar wetted with salt water is not allowed for as damaged, but if the sugar be increased in weight an allowance is made (3). An increase of quantity by water or dirt is allowed for by the practice in the port of London, but no allowance is made for damage on oil leaked out of packages and afterwards pumped out of the ship's hold (4). The practice at the London Docks, with regard to rice, is to weigh it on its being

Allowances for Tare, Damage, &c.

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(1) 33 Geo. 3. c. 71. s. 5.

(2) 27 Geo. 3. c. 13. s. 33.

(3) By Order of the Board of Customs, dated 10th Jan. 1788, and 19th Dec. 1795.

(4) Order of the Board of Customs, Nov. 1814, Pope, 13. reg. 2. note b.

Allowances for Tare, Damage, &c.

landed, and then to lodge it in warehouses, where the contents of each cask are passed through a screen, the damaged separated from the sound, and the tare of each cask taken, and on its being delivered for home consuption, the duty is paid on the difference between the landing and delivery weights (1).

5thly, Cockets and Clearances. (2)

The cocket is an instrument certifying the payment of the duty or the regular entry of the goods, if not liable to duty (3). When the merchant has discharged the customs, a piece of parchment is delivered to him called a cocket, which certifies the payment of them, and of all duties for such goods; and when he has marked and numbered the goods, he indorses them on the back of the cocket and shipping bill, mentioning the true contents of each package (4). After the merchant has given the cocket and shipping bill to the searcher, he may ship off the goods; and when he has obtained the mate's receipt for them, he delivers it to the master, who will then sign the bills of lading (5). When the master *cleared* his vessel with the collector, &c. all the cockets must be delivered to the searchers; because they are to examine the ship, to see if there are more goods on board than what are mentioned in the indorsements on the several cockets; and if there are not any other goods they are to discharge the tidesmen and deliver the cockets to the master, permitting him to proceed on his intended voyage (6). The statute 26 Geo. 3. c. 40., requires that every master of a vessel, on board of which goods are shipped for exportation to foreign parts from a port in Great Britain, shall upon demand produce and deliver to every officer of the customs who shall come on board the ship, either within the limits of a port in Great Britain or within four leagues of the coast (7), the cockets delivered by the officers at the place

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(1) Order of Board of Customs, 30th June 1807. Pope, tit. 13. See as to damaged tobacco, id. tit. 186.; as to damaged wine, id. 188. 59 Geo. 3. c. 52. s. 27; and see the old method, Postlethw. Dict. Com. at the end of letter A.

(2) See division of the subject, ante, 692. 725.

(3) Postlethw. letter A. 1 Harg. Law Tracts, 102 a. Montefiori, tit. Custom House. The cocket is an instrument of great antiquity. It is so called from the words quo quietus est, when it was framed in latin.

(4) Montef. tit. Custom House, where see the form of the cocket and indorsement.

(5) Montef. tit. Custom House. There should be two cockets when some of the goods are liable to duty and some not, id. ibid.

(6) Pope, tit. 10. note a.: and as to searching and seizing, see infra.

(7) Vide 47 Geo. 3. sess. 2. c. 66. s. 17.

where the ship has been cleared out, under the penalty of £100; and if the officer should find any goods on board the ship that do not correspond with the cockets produced, he is authorised to seize the goods as forfeited; or if the officer should discover that the packages indorsed upon the cockets so produced are not on board the ship, the master will forfeit £20 for each package contained in the cocket, and not found (1). The statute 43 Geo. 3. c. 128. was passed in consequence of the errors which were in the accounts of the exports of Great Britain, through the neglect of merchants and other exporters of goods, in not delivering to the controlling searchers of the customs a shipping bill or copy of the cocket for goods intended to be exported. The act provides, that it shall not be lawful for any person to lade or put on board a vessel from any quay, wharf, or other place, or land any goods whatever, with intent to export them to parts beyond the seas, until he has delivered to the controlling searchers of the customs a correct copy in writing of the cocket or entry (together with the indorsement upon it), for all such or goods so intended to be exported; and the controlling searchers or other officers of the customs are authorised to detain any goods for which the shipping bill or copy of the cocket with the indorsement upon it has not been delivered (2.) The cocket or clearance of foreign goods exported from Great Britain to Ireland, or from Ireland to Great Britain, must specify whether the goods were first imported in a British-built ship, or in a foreign ship into the country from which they are so exported; and the import duty of customs is payable in either country into which they happen to be imported. And if it be not expressed in the cocket or clearance of the goods whether they were so first imported in a British or a foreign ship, they will be liable to the same import duties in the country to which they are imported as they would have been if the importation had taken place in a foreign ship (3). The terms cocket and clearance appear to have been sometimes used by the legislature as synonimous expressions (4), though according to some authorities it seems, that the clearance, in propriety of language, is not any single document, but the collection of all the papers necessary to enable the ship to sail. (5)

Of Cockets and Clearances.

(1) 26 Geo. 3. c. 40. s. 17.
(2) 43 Geo. 3. c. 128.
(3) 55 Geo. 3. c. 83. s. 2.
(4) See 55 Geo. 3. c. 83. s. 2.
(5) Vide Morgan v. Oswald, 3 Taunt. 565. Scotland v. Wilson, 1 Marsh, 206.

6thly, Landing and shipping Goods in Presence of Officer. Master's and Owner's Bond, &c. (1)

No goods can be landed or shipped without the presence of the officers, to whom notice should therefore be given. The statute 13 & 14 Car. 2. enacts, that if any wharfinger or keeper of a wharf, crane, or quay, or his servants, shall either land or ship off, or suffer to be waterborne at or from their wharfs, cranes, or quay, any goods that are prohibited or charged with duty, without the presence of some of the officers of customs appointed for that purpose, or at hours and times not appointed by law, (except in the port of Hull, as it is excepted in 1 Eliz.) or goods passing by certificates, waste cocket, or otherwise, without the presence of or notice given to one or more of his majesty's officers, every such wharfinger will forfeit £100; and if goods be taken on board a vessel outward bound, or discharged from a vessel arriving from foreign parts without a warrant and the presence of one or more officers of the customs, such vessel will be forfeited; and the master or mariner of a ship inward bound, if he knows and consents to such a breach of the law, will forfeit the value of the goods unshipped (2). Further, if any carman, porter, waterman, or other person shall assist in taking up, landing, shipping off, or carrying away any such goods, such carman or person may be apprehended by the warrant of a justice of the peace, who is authorized to examine witnesses upon oath, and if the fact be proved by the oath of two witnesses, the offender may, for the first offence, be committed to the next gaol, there to remain till he find surety for his good behaviour, until he shall be discharged by the lord treasurer, chancellor, or under treasurer; and after he has been once convicted, he may be committed for the second offence to the next gaol, there to remain for two months, without bail or mainprize, or until he shall pay £5 to the sheriff of the county for the use of his majesty, or shall be discharged by the lord treasurer, chancellor, under-treasurer, or court of exchequer (3). If any goods imported into Great Britain, whether liable to duty or not (except diamonds, jewels, pearls, precious stones and bullion, and fresh fish, British taken and imported in British-built vessels, owned, navigated, and registered according to law, and except turbots and lobsters however taken and imported), are unshipped or landed without the presence of the proper officer of customs, either on Sundays

(1) See division of the subject, ante 692. 725.

(2) 13 & 14 Car. 2. c. 11. s. 7.

(3) 13 & 14 Car. 2. c. 11. s. 7.; and see as to seizing and detaining goods carried without presence of officer, 6 Geo. 1. c. 21. s. 39, 40. & post.

or holidays or at any other times, such goods will be forfeited, and are, consequently, liable to be seized by the officers (1). The statute 12 Geo. 1. c. 28. also enacts, that if goods on which duties are payable, or goods prohibited to be exported, are shipped for parts beyond the sea, without a warrant or the presence of an officer of the customs appointed for that purpose, the goods, or the value of them, will be forfeited and lost, one half of the benefit of the forfeiture being reserved for the crown, and the other half for the person seizing or informing (2). As a precautionary measure against the illegal employment of a vessel, in carrying prohibited or uncustomed goods, it is enacted, by the statute 26 Geo. 3. c. 40., that it shall not be lawful for any officer of customs in Great Britain, to permit a vessel to be cleared out from Great Britain for foreign parts, until the master and mate have severally given security, by *bond*, to his majesty through the medium of the collector or other principal officer of customs, in the penalty of £200, with a condition, that the said master or mate will not, at any time thereafter, land goods in any part of the kingdom in a manner prohibited by law, or take the same on board in order to their being so landed, nor be anywise concerned or aiding in fraudulently importing, unshipping, or landing the same, and will not hinder, molest, or oppose any of his majesty's officers of customs or excise, or any other person assisting them or either of them in the due execution of their respective offices or employments, or until the master of such vessel shall produce a certificate, under the hand of the collector or other principal officer of customs at some other place in Great Britain, of such security having been before given by the master and mate (3). A bond given under this statute by the master of a vessel is not confined in its operation to the voyage immediately subsequent to the execution of it, but extends to voyages undertaken afterwards by the master while he continues entrusted with the care of the same ship (4). The *owner* of a vessel licensed in pursuance of act of parliament (5) is also required, by the statute

Landing and shipping Goods in Presence of Officer.

Master's Bond.

(1) 36 Geo. 3. c. 82. s. 1. 27 Geo. 3. c. 13. s. 12. 1 Eliz. c. 11. s. 2.

(2) 12 Geo. 1. c. 28. s. 18.

(3) 26 Geo. 3. c. 40. s. 15.

(4) The King v. M'Leod, 3 Price's Rep. 203.

(5) As to licences for vessels, see stat. 47 Geo. 3. sess. 2. c. 66. s. 1. & 2.; by whom to be granted, s. 24.; and the port at which it is to be granted, 57 Geo. 3. c. 87. s. 18.; and the navigation or manning of vessels. 47 Geo. 3. sess. 2. c. 66. s. 5. 57 Geo. 3. c. 87. s. 17.; and see as to vessels and boats, Pope, tit. 2. per totum.

Landing and shipping Goods in Presence of Officer.

46 Geo. 3. c. 137., before the vessel proceeds to sea or sails out of port, to give security by bond in the manner directed by the statute 24 Geo. 3. sess. 2. c. 47. (1), that the vessel shall not be employed in the importation or landing of tea or foreign spirituous liquors, or any other articles, contrary to the true intent of any act of parliament then or thereafter to be in force; or in the exportation of goods prohibited to be exported, or in the relanding of goods which are entered outwards for exportation, for any drawback or bounty, or which are prohibited to be used in Great Britain; and also that the vessel shall not be found in any part of the British or Irish channels, or elsewhere on the high seas, within one hundred leagues of any part of the coast of Great Britain or Ireland, or discovered to have been within those limits, having on board any spirits, tea, tobacco, or snuff, in any manner contrary to the statute 45 Geo. 3. c. 121. (2); and also that the vessel shall not be employed or be discovered to have been out of the limits within which she is licensed to navigate or trade, and shall not be engaged in any employment whatever other than that described in the licence, and shall not be used or employed in any other way whatever contrary to the laws in force, or hereafter to be made, relative to the revenue of customs. A more ample security than that mentioned in the 24 Geo. 3. was afterwards required by the statute 56 Geo. 3. c. 104., which provides that a bond shall be given by the owners of every vessel for which a licence is required, in treble the value thereof: the security to be given under the same regulations as were provided by the laws in force on the 1st of July 1816 as far as the same are applicable; and the owners of the vessel are to give the necessary security at that port alone to which the vessel belongs (3); and the sureties must be responsible persons residing at or near the port, and approved of by the collector and controller of customs (4). But the owners of a vessel square-rigged, and of the value of £1,000 and upwards, for which a licence is required, are only compellable to give security in the sum of £3000, and not to any larger amount (5). The statute 53 Geo. 3. c. 47. requires the collector or principal officer of customs to take the like bonds as had heretofore been given by mates of British merchant vessels from a person appointed to

(1) Vide etiam 56 Geo. 3. c. 104. s. 23. et infra.

(2) See post, as to hovering.

(3) Vide as to the port, 57 Geo. 3. c. 87. s. 18.

(4) 56 Geo. 3. c. 104. s. 23.; and see the proper port, 57 Geo. 3. c. 87. s. 18. and the surety's oath, s. 19.

(5) 59 Geo. 3. c. 121. s. 12.

serve as mate, who has not attained the age of eighteen years, and all such bonds will be as valid and effectual at if the person executing them had not attained the age of twenty-one years. The Bond, &c.

7thly, Of the Regulations on carrying Goods Coastwise; Cocket, Sufferance, Bond, &c. Seizures, &c (1)

Previously to the shipment of goods to be carried coastwise from one port in England to another, it was required by the stat. 13 & 14 Car. 2. c. 11. that a *sufferance* or warrant should be obtained from the officers of customs, in default of which the goods should be forfeited, and the act required that the master of every vessel that should lade or take in goods in any port in England to be discharged in some other port, should, before the vessel was removed out of the port of lading, take out a cocket or cockets, and become bound (2) to the king with good security, in the value of the goods, for the delivery and discharge of them, in the place for which they are entered, or in some other place in England; and, except when prevented by the dangers and accidents of the seas, to return a certificate (3) within six months after the date of the cocket, under the hands and seals of his majesty's officers, signed also by some of the officers of customs or their deputies, in every port where the goods shall be landed and discharged, to the officers of customs to whom such security has been given as before-mentioned, that the goods were there landed and discharged accordingly, under the penalty of the forfeiture of the bond and security (4). The statute 8 Geo. 1. c. 18. provides, that when goods coming by any vessel to a port in Great Britain from any other port in the same country, by coast cocquet, transire, let-pass, or certificate, are unshipped in order to be landed before such cocket or other document is delivered to the customer or collector and controller of the port of arrival, and a warrant or sufferance is granted by the customer, collector, and controller for landing or discharging them; the master, purser, boatswain, or other mariner, taking charge of the vessel out of which the goods are landed or put on shore, if he knows or consents to it, will forfeit the value of the goods un-

(1) See division of the subject, ante, 692. 725. Vide as to Ireland, &c. 55 Geo. 3. c. 118.

(2) By 1 Ann. stat. 1. c. 26. s. 3. the proper officers for transmitting the bonds into the exchequer, must truly and faithfully indorse on every such bond the substance of the certificate, if there be any relating thereto, and sign such indorsement to serve as an intimation in the court of Exchequer, concerning the performance or non-performance of the conditions of such bonds, under the penalty of forfeiting treble damages, besides costs of suit; to be recovered by the party grieved against the officer, Pope, tit. 10.

(3) See last note.

(4) 13 & 14 Car. 2. c. 11. s. 7.

Regulations of Coasting Trade.

shipped; and if any goods of foreign growth, production, or manufacture, coming coastwise, are landed without the presence of an officer of the customs, such foreign goods or their value will be forfeited and lost (1). But the inconveniences which were found to arise from requiring the coast cocket and bond in the coasting trade, occasioned an alteration to be made in the law relating to this subject, by the stat. 32 Geo. 3. c. 50. The necessity for these two documents was removed by this act, but it was provided that no goods prohibited to be exported from Great Britain to foreign parts, nor any goods liable to duty or return of premium or bounty, or entitled to allowance for waste on exportation, or on being carried coastwise, nor any goods warehoused upon importation, on payment of a certain duty, and afterwards carried coastwise for the purpose of exportation, nor any goods liable to duty on importation or exportation, unless the amount of the duty does not exceed five pounds, should be allowed to be removed coastwise from any port, creek, or member of a port in England, until the master has taken out a cocket and become bound to the king for the delivery and discharge of the goods, in the like manner as was required by law before the passing of this act; nor to be shipped in Scotland for the purpose of being carried coastwise to any part of Great Britain, until the master has obtained a sufferance warrant or permit for the shipment, and become bound, with good security to his majesty, in the value of the goods contained in the sufferance warrant or permit, or in the indorsement to be made upon it, as directed by the act (2), for the due landing of the same; and also (except when prevented by the dangers and accidents of the sea) for returning a certificate from the chief officer of customs at the port, member, or creek where the same shall be landed and discharged, within six months after the date of the sufferance, to the officers of customs to whom such security has been given as aforesaid, that the goods were there landed and discharged accordingly, under the penalty of forfeiting the security aforesaid (3). All goods allowed to be carried coastwise without cocket and bond, may be laden on board a British ship, at a port in England, by a sufferance or warrant, and carried forth to the open sea, to be landed at any other place in Great Britain by transire or let-pass only; and at any port in Scotland, by sufferance warrant or permit; and may be removed in like manner by such

(1) 8 Geo. 1. c. 18. s. 18. 32 Geo. 3 c. 50. s. 5.

(2) 32 Geo. 3. c. 50. s. 7.

(3) 32 Geo. 3. c. 50. s. 1.

(1) 32 Geo. 3. c. 50. s. 2.

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sufferance warrant or permit, indorsed in the manner directed by the act. But no transire or let-pass is required in any case where the vessel does not go to open sea, or where cocket and bond, or transire or let-pass, were not required by law on the 1st March 1792 (1). But no goods laden at a place in Scotland, by sufferance warrant or permit, and without cocket and bond, or without cocket, can be removed without such sufferance or other document accompanying them, and a certificate of the shipping officer indorsed thereon, certifying the particulars of the goods which were shipped by virtue thereof (2). The master of a vessel on board which goods are laden, in order to be carried coastwise in Great Britain, who proceeds coastwise in England, without a cocket, transire, or let-pass, or in Scotland, without a sufferance warrant or permit, indorsed in the manner directed by the act, when such documents are respectively required, is liable to forfeit £50 (3). The goods are also liable to be seized, if they are unshipped before the cocket has been delivered to the officer. For it is provided by the stat. 32 Geo. 3. c. 50. that if any goods coming into port in any part of Great Britain, from a place in England, by cocket, transire, or let-pass, or from a place in Scotland, by sufferance warrant or permit, indorsed as required by the act, are unshipped or landed before the cocket or sufferance, or other document is delivered to the collector, customer, or controller, at the port of arrival, and the warrant and sufferance obtained from that officer for landing the goods, the master will forfeit the value of the goods; and if foreign goods arriving coastwise are landed without the presence of an officer, such goods or the value of them will be forfeited (4). A penalty of £200 is inflicted on all who counterfeit or falsify any sufferance or cocket, or other custom house document, or any indorsement upon it, required by the stat. 32 Geo. 3. c. 50. and the documents are rendered null and void (5). Articles not included in the coast cocket or other document are liable to forfeiture. The statute 32 Geo. 3. c. 50. declares, that if, after the shipment of goods to be carried coastwise, and after the master has received a cocket, transire, let-pass, sufferance, or permit, or other coast document, as directed by that or any former act, expressing or indorsed with the particulars of the goods shipped, it is found by any officer of the customs, on examination, that the goods laden on board exceed

(1) 32 Geo. 3. c. 50. s. 2.
(2) 32 Geo. 3. c. 50. s. 3.
(3) 32 Geo. 3. c. 50. s. 4.
(4) 32 Geo. 3. c. 50. s. 5. 8 Geo. 1. c. 18. s. 18.
(5) 32 Geo. 3. c. 50. s. 6.

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in quantity the particulars of the goods expressed in the document, or on the indorsement upon it, the goods that exceed the authorized quantity will be forfeited (1). Nevertheless, if it can be made appear to the satisfaction of the commissioners of customs, that the excess has arisen from mistake, and without a fraudulent intention, the commissioners may waive the forfeiture without any reward or satisfaction to the seizing officer, if it appear to them reasonable to do so. (2).

Coasting Bond.

A *bond* is required to be given by a master engaged in the *coasting trade* as a security for his lawful conduct, before he is allowed to clear. The statute 32 Geo. 3. makes it unlawful for any officer of the customs in Great Britain to permit a vessel to be cleared out coastwise until the master has given a bond to his majesty, through the medium of the collector or other principal officer of the customs, in the penalty of £100, (which bond is to be taken before the collector), with condition that the master will not at any time thereafter land, or suffer to be landed, any goods in any part of the kingdom, in a manner which is prohibited by law, or take the same on board, in order to their being so landed, or be any ways concerned or aiding in fraudulently importing, unshipping, or landing the same, and will not hinder, molest, or oppose any officer of customs or excise, or any other person, in the due execution of his office or employment, or until such master shall produce a certificate under the hand of the collector or other principal officer of customs at some other place in Great Britain, of such security having been before given at such other place, to such collector or other principal officer by such master as aforesaid (3). The commissioners of customs are also empowered, whenever it appears to them to be necessary for the relief of the coasting trade, to authorize any officer of customs stationed at any creek, harbour, bason, or out-station in Great Britain, at which any goods or passengers may be shipped in order to be carried coastwise, to take the coast bond or transire and other documents required to be given for the clearance of the vessel, and the delivery and discharge of the goods or passengers at the place for which they were entered, or in some other place of Great Britain, and for returning to the proper officers of the customs of the port where such bond or transire or other documents have been given, the

(1) 32 Geo. 3. c. 50. s. 7.
(2) 32 Geo. 3. c. 50. s. 8.
(3) 32 Geo. 3. c. 50. s. 9.; and see s. 10. as to distribution of penalties and recovery of forfeitures.

certificate required by law to be produced to them from the officers of the port at which the goods and passengers are intended to be discharged; and every coast bond or other document taken by and in the presence of any such officer is to be as valid and effectual as if taken at the custom-house by and in the presence of the collector and controller of customs for the port to which such creek or harbour may belong (1). However, no sufferance warrant, transire, or other document, can at the present day be required by any officer of the customs on the shipping, carrying, conveying, removing, or landing coastwise within the kingdom of Great Britain, of any lime, limestones, chalk, sand, marl, or dung; nor can any fee, gratuity, or reward be lawfully charged by any officer of the customs in respect of the coastwise trade in any of these articles, on any pretence whatever. (2)

Regulations of Coasting Trade.

Many frauds have been at different times discovered to have been committed by the masters of vessels engaged in the coasting trade, in importing goods that were prohibited or had not paid the legal duties. The statute 9 Geo. 1. c. 21. in providing against the commission of such illegal acts, declares, that if any tobacco or other foreign goods shall be taken on board a coasting vessel in parts beyond the seas, or out of another vessel, or at any port in this kingdom except that from which the goods are certified, the goods and double value will be forfeited, and the master of the coasting vessel will also forfeit the value of the goods (3). A coasting vessel is also liable to be searched. The statute 9 Geo. 2. c. 35. s. 39. enacts, that it shall be lawful for any officer of customs or excise, producing his warrant or deputation, if required, to enter on board a coasting vessel which may be within the limits of any of the ports of this kingdom, and to rummage and search the cabin and all other parts of the coasting vessel for prohibited and uncustomed goods. And such officer is authorized by the statute to remain on board the vessel during the whole time that it continues within the limits of the port. An obstruction of the officer renders the offender liable to a penalty of £ 100. (4)

(1) 55 Geo. 3. c. 118. s. 3.
(2) 36 Geo. 3. c. 110.
(3) 9 Geo. 1. c. 21. s. 8., and see s. 9, 10.
(4) 9 Geo. 2. c. 35. s. 29., misprinted 39. Pope, tit. 10.

Fourthly, the Penalties and Forfeitures incurred by illicit Trade. (1)

The preliminary regulations which the law has prescribed to be observed for securing the payment of the duty, having thus been considered, we will proceed to inquire into the *forfeitures and penalties* (1) consequent on trading in prohibited or uncustomed goods—the *powers of searching for and seizing* such goods—the *officers* by whom these powers may be exercised—the *proceedings* for the recovery of penalties and condemnation of goods—the method of procuring the *restoration* of seizures—the *remission* or *mitigation* of penalties—and lastly, the *immunities and protection* afforded to the officers concerned in the execution of the laws relating to the revenue, and the liability which they incur.

Forfeiture of Vessels *hovering*, &c. with illegal Cargoes, &c. or having Implements of Smuggling on board, taking Goods on board, or discharging them at Sea, and of arresting Persons for such Offences.

The forfeiture of vessels and prohibited cargoes found *hovering* near the coast, was provided for by the statute 24 Geo. 3. c. 47.; but the distance within which a seizure may be made on this ground has been extended by the statute 47 Geo. 3. sess. 2. c. 66. s. 17. The 24 Geo. 3. enacts, that if any vessels are found at anchor or hovering within the limits of the ports of this kingdom, or within four leagues of the coast (2), or discovered to have been within those limits, or that distance, (and not proceeding on their voyage, wind and weather permitting, except in case of unavoidable necessity and distress of weather, of which necessity and distress the master is bound to give notice and make proof before the collector or other chief officer of the customs of the port within the limits of which the ship is found, immediately after the arrival of the vessel within the limits of the port,) having on board any *brandy*, or other spirituous liquors, in any vessel or cask not containing *sixty gallons* (3) at the least, (except for the use of the seamen belonging to and on board the vessel, and not exceeding two gallons for each seaman,) or having on board any wine in casks (provided the vessel having *wine* on board does not exceed *sixty tons* burthen), or having on board 6 lbs. weight of tea, or 20 lbs. weight of coffee, or having on board *any goods* whatsoever, liable to forfeiture by act of parliament, on being imported (4), " then not only all such goods, but the vessel on board of which they are found, with her guns,

(1) See division of subject, ante, 692.

(2) Since extended to 100 leagues, 47 Geo. 3. sess. 2. c. 66. s. 17. infra.

(3) Vide Clugas v. Penaluna, 4 T. R. 466. 45 Geo. 3. c. 121. s. 1. & infra. As to rum in casks under twenty gallons, 5 Geo. 1. c. 11. s. 2.

(4) Attorney General v. Sheriff, Forrest's Rep. 43. & infra.

furniture, ammunition, tackle, and apparel, will be forfeited (1). An information having been filed in the court of exchequer, on the stat. 24 Geo. 3. on the ground of the forfeiture of a vessel and her cargo, for having wine on board in vessels of smaller dimensions than are authorized by the statute 1 Geo. 2. c. 17. from the operation of which act, however, certain species of wine were particularly excepted (2), it was holden by the court that it was not necessary, on the part of the crown, to prove the quality of the wine, but that it was the duty of the defendant to prove that it came within the exception; and the information stating that the vessel was discovered to have been within the limits of a port, &c. as in the stat. 24 Geo. 3. having on board wine liable to forfeiture by act of parliament on the ground of its being brought in casks which did not contain twenty-five gallons, was held sufficient after verdict, without negativing the exceptions in the stat. 1 Geo. 2. (3) The forfeiture of the ship and cargo, by virtue of the 24 Geo. 3. and of the laws relating to the revenue, has been considered to attach the moment the unlawful act is done, so as to prevent intermediate alienations or incumbrances; but the actual property is not altered till after seizure, although it may be before condemnation; and if, after the vessel has become liable to forfeiture, she should go another voyage, and be seized on her return, the crown would not be entitled to the intermediate earnings, after deducting the expences

Forfeitures incurred by Smuggling and illegal Trade.

(1) 21 Geo. 3. c. 47. s. 1.; and see 45 Geo. 3. c. 121. s. 1. 47 Geo. 3. sess. 2. c. 66. s. 17. 57 Geo. 3. c. 33. 59 Geo. 3. c. 121 & infra And see before the 24 Geo. 3. Smith v. Reynolds, 2 Wils Rep. 257.

(2) By 1 Geo. 2. st. 2. c. 17. wine is prohibited to be imported in flasks or bottles, or in any vessel or cask containing less than twenty-five gallons; and the term vessel, in acts subsequent to 1 Geo. 2 c. 17. does not include bottles; and the prohibition on the importation of Port and Spanish wines, or any other wine but French (39 & 40 Geo. 3. c. 23. and 42 G. 3. c. 44. s. 1.) Tuscan, Turkey, and Levant wine (1 G. 2. st. 2. c. 17. s. 8.) in bottles still remains, and no wines, except French wines, and those excepted in the 1 Geo. 2. c. 17. s. 8. and wine in bottles from Ireland under 55 Geo. 3. c. 83. s. 6. can be legally imported in bottles, or admitted to entry for the private use of the importer. Order of Board of Com. 17th May 1816. And on 28th February 1818, a notice was given that after 18 months from that time, and in some cases a shorter space, wine in bottles or flasks, except French, Tuscan, Turkey, or Levant wines, or wine from Ireland, would be seized. Pope, tit. 188.; and as to the manifest on wine, see Pope, tit. 188. Forrest's Rep. 43.

(3) Attorney General v. Sheriff, Forrest's Rep. 43. 1 Geo. 2. st. 2. c. 17.

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of the outfit (1). It seems that the custom-house officers may seize for the forfeiture within three years after the fact has been committed, and that the attorney general may file an information at any time whilst the ship is in being (2). Goods found on board within the limits or distance that we have mentioned, whether with or without the privity of the master, are forfeited, and the persons in whose charge or possession they are found will forfeit treble value (3). But the 24 Geo. 3. provides that the act shall not extend to prevent evidence from being received in any suit or information for the forfeiture of any vessel on account of goods contained therein, in order to show, from the smallness of the quantity and the other circumstances of the case, that the goods were on board without the knowledge and privity of the owner or master, and without any wilful neglect or want of reasonable care on the part of either of them in the discharge of his duty; and when proof is so made, the vessel, if it be of more than 100 tons burthen, is not exposed to forfeiture (4). The limits for seizing vessels liable to forfeiture for hovering, are extended by the statute 47 Geo. 3. sess. 2. c. 66. Every vessel, belonging in the whole or in part to his Majesty's subjects, or one half of the crew of which consists of British subjects, liable to forfeiture for hovering or being found and discovered to have been within 4 or 8 leagues of such part of the coasts of Great Britain or Ireland as are described in the acts of parliament, is liable to forfeiture under the 47 Geo. 3., together with the goods on board and the furniture of the ship, if found in any part of the British or Irish channels, or elsewhere on the high seas, within 100 *leagues* of any part of the coasts of Great Britain and Ireland under the same circumstances (5). Every vessel or boat coming from foreign parts, and belonging wholly or in part to his Majesty's subjects, or having a crew half consisting of his Majesty's subjects (6), (except a ship or other square-rigged vessel) if found in any part of the British or Irish channels, or elsewhere on the high seas within 100 leagues of any part of the

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(1) Per Willes J. Lockyer v. Offley, 1 T. R. 260. See upon this subject, Wilkins v. Despard, 5 T. R. 112. Attorney General v. Forster, 3 Price, 97. 2 Ves. 116. 288.

(2) Lockyer v. Offley, 1 T. R. 261. As to the information, see Attorney General v. Sheriff, Forrest, 43.

(3) 24 Geo. 3. c. 47. s 3.

(4) 24 Geo. 3. c. 47. s. 2.

(5) 47 Geo. 3. sess. 2. c. 17.

(6) See 59 Geo. 3. c. 121. s. 1. & infra.

coasts of Great Britain or Ireland, or discovered to have been within those limits, having on board any *foreign spirits* in any package of less size or content than 60 gallons (1), (except only for the use of the seamen, not exceeding two gallons for each seaman), or any *tea* exceeding 6 lbs. in the whole (2), or any *tobacco* or *snuff* in a package containing less than 450 lbs. (3) (except loose tobacco for the use of the seamen, not exceeding 5 lbs. of tobacco for each seaman, and except such tea or manufactured tobacco or snuff as shall have been duly shipped for exportation, as merchandize, on board such vessel or boat, from some place in Ireland), is forfeited, with her tackle and furniture, together with all such tea, tobacco, or snuff, and may be seized by any officer of his Majesty's navy or marines, or of the customs or excise (4). And every *foreign* smuggling vessel or boat containing one or more subjects of his Majesty, whether mariners or persons pretending to be passengers, which is found or discovered to have been within *four* leagues of that part of the coast of Great Britain which is between North Foreland on the coast of Kent, and Beachy Head on the coast of Sussex, or within *eight* leagues of any other part of the coast of Great Britain or Ireland, having on board foreign spirits in a package of less size or content than 60 gallons, (except only for the use of the seamen, not exceeding two gallons for each seaman,) or any tea exceeding 6 lbs. in the whole, or any tobacco or snuff in a package containing less than 450 lbs., except loose tobacco for the use of the seamen on board, not exceeding 5 lbs. for each seaman, and except such tea or manufactured tobacco or snuff as has been duly shipped for exportation as merchandize on board the ship from some place, is forfeited, and may be seized, and prosecuted for smuggling (5). The statute 57 Geo. 3. c. 33. provides that if any vessel (not being square-rigged) coming from a place between Brest in France, and the Helder Point in Holland, (inclusive of the Texel Isle and all places on

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(1) Clugas v. Penaluna, 4 T. R. 466.

(2) Ships not belonging to East India Company [having more than six pounds of tea on board] except for the use of each person, at the rate of one pound per head, are forfeited by 54 Geo. 3. c. 36. s. 35.

(3) Vide 28 Geo. 3. c. 68. s. 9.

(4) 45 Geo. 3. c. 121. s. 1. and vessels not coming from foreign parts, but taking in such articles at sea, from vessels so coming, are deemed to have come from foreign parts. 45 Geo. 3. c. 121. s. 2. As to the persons to seize, see post.

(5) 59 Geo. 3. c. 121. s. 1. his Majesty's subjects found on board liable to be detained and delivered over to navy, and detaining officer prosecuted, ibid.; and how the 8 leagues are to be measured, Pope, tit. 5. reg. 69. n. c.

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the Zuyder Zee, and all islands on the coast of France, the Netherlands, and Holland, between Brest and the Texel), shall arrive in any of the ports of Great Britain, or be found at anchor, or hovering within the limits of any of the ports, or within *four* leagues of that part of the coast which is between North Foreland and Beachy Head, or within *eight* leagues of any other part of the coast, or shall have been discovered to have been within those limits or distances, and not proceeding on her voyage, wind and weather permitting, except in a case of unavoidable necessity and distress of weather, of which the master is to give notice and make proof before the collector, immediately after her arrival within the limits of the port, having on board for the use of the seaman any spirituous liquors, exceeding half a gallon for each seaman, or having on board any tea exceeding two pounds in the whole, or any tobacco, except loose tobacco, not exceeding one pound for each seaman, the ship and goods are forfeited, and may be seized by any officer of the army, navy, or marines, or of the customs or excise (1). If a vessel (not being square-rigged) coming from a place between Brest and Finisterre, inclusively of all islands on the coast of France and Spain between those places, or coming from a place between Helder Point in Holland and North Bergen in Norway, or from any place as far up the Cattegat as Gottenburgh, inclusively of all islands on the coasts between those places, arrives in any of the ports of Great Britain, or is found at anchor or hovering, or is discovered to have been within those limits or distances, and not proceeding on her voyage, wind and weather permiting, unless in a case of unavoidable necessity and distress of weather, of which the master ought to give notice and make proof before the collector, having on board for the use of the seamen then belonging to and on board the vessel, any spirituous liquors exceeding one gallon for each seaman, or any tea exceeding four pounds in the whole, or any tobacco, except loose tobacco, not exceeding two pounds for each seaman, the goods and vessel with her tackle will be forfeited, and may be seized by any officer of the army, navy, or marines, or of customs or excise (2). The same provisions and forfeitures have been since extended to all vessels not being square-rigged coming from the port of Brest which arrive in the ports of Great Britain, or are found at anchor or hovering within the same

(1) 57 Geo. 3. c. 33. s. 1.

(2) 57 Geo. 3 c. 33. s. 2. Vide an opinion of the Attorney and Solicitor General on this act, Pope, tit. 5. reg. 69. n. d. 4 ed.

limits or distances, having on board for the use of the seamen any spirituous liquors exceeding one gallon for each seaman, or any tea exceeding four pounds in the whole, or any tobacco, except a quantity of loose tobacco not exceeding two pounds for each seaman. (1) Forfeitures incurred by Smuggling and illegal Trade.

If a vessel or boat belonging wholly or in part to a British subject, or having a crew half composed of British subjects, is discovered to have been within the limits of a port of the united kingdom, or in any part of the British or Irish channels, or elsewhere on the high seas within a hundred leagues of any part of the coasts of Great Britain or Ireland, having on board, or having had on board during that voyage, any *small cordage* adapted for slinging small casks; or having on board, or having had on board during the voyage, more ankers, half-ankers, or other small casks under sixty gallons, or any tin or other cases or bladders of less content than sixty gallons (and capable of containing liquids), of the description used or intended to be used or adapted for smuggling spirits, than are really necessary for the use of the vessel, or any materials for making such casks or cases; or having on board, or having had on board during the voyage, any syphon, tube, hose, or implements for broaching or drawing any fluid, more than it is usual and necessary to have on board for the fair and ordinary purposes of the voyage, and not being a part of the cargo, and included as such in the regular official documents; or having on board, or having had on board during the voyage, any articles, implements, or materials adapted and prepared for repacking any tobacco or snuff which may be on board, or have been on board during the time; the vessel and her tackle, together with the illegal implements on board, is forfeited and liable to be seized. (2) Implements of Smuggling.

The transhipment of foreign goods from one vessel into another on arriving near the coast, in order that they may be afterwards fraudulently landed, is provided against by the statute 9 Geo. 2. c. 35., which enacts, that if any foreign goods are taken in at sea by any ship, boat, or other vessel whatever, or are discharged from any vessel within the distance of four leagues from the coast, whether within the limits of a port or not, with- Unshipping, &c. at Sea.

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(1) 59 Geo. 3. c. 121. s. 6. As to tobacco, see Pope, tit. 186. s. 8.; and see further provisions, s. 9.

(2) 47 Geo. 3. sess. 2. c. 66.

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out payment of the customs and other duties payable upon them, except in a case of apparent necessity, or of some other lawful reason, which the master taking them in must proceed to prove before the chief officer of the customs at the first port in the kingdom at which he arrives; the goods will be forfeited and lost, and the master of the vessel into which they are taken, and all persons concerned in unshipping or receiving them, forfeit treble the value; and the vessel receiving them, if it be not above the burthen of 100 tons is forfeited, and the master of the vessel out of which the goods are taken forfeits treble value. (1)

Arresting Persons found unshipping Goods, &c.

Every person being a subject of his Majesty who is found on board or discovered to have been on board a vessel liable to forfeiture for being found, or having been at anchor, or hovering within such distances of his Majesty's dominions with goods on board which subject the vessel to forfeiture, and who does not prove that he was only a passenger; and every person found aiding in unshipping in order to be laid on land, or found carrying, conveying, concealing, or assisting in carrying away, conveying, or concealing any foreign brandy, rum, geneva, or spirits subject to forfeiture under the 45 Geo. 3. c. 121., or any law relating to the revenue of customs or excise in the united kingdom, will forfeit treble value of the goods or £100 at the election of the commissioners of customs or excise (2), who direct the prosecution against him, besides such other punishment as may by law be inflicted for the offence; and the officers of the army, navy, marines, customs, or excise, are empowered to detain the person and convey him before a neighbouring magistrate, who may require him to give bail to answer any indictment or information that may be preferred against him; an option being nevertheless given to him to enter into the king's marine service (3). The opinion of the law officers of the crown has been stated to be, that persons found removing or concealing smuggled spirits are liable to arrest wherever or

(1) 9 Geo. 2. c. 35. s. 23. £50 penalty on bribing officer, s. 24. How forfeitures recovered and distributed, s. 25. And see 5 Geo. 1. c. 11. s. 3.

(2) By 47 Geo. 3. sess. 2. c. 66. s. 38, 9. the statement in the information that the commissioners had made the election is sufficient evidence of the fact to warrant a conviction.

(3) 45 G. 3. c. 121. s. 7. and see 58 G. 3. c. 76. s. 1. as to persons not British subjects within one league. Pope, tit. 5. reg. 71. note a.

whenever such removal or concealment may be detected, but in such cases there must be some circumstances from which it may be fairly collected that the spirits have been smuggled; the mere removal of spirits or the possession of them without a permit to protect them, though it would subject the spirits to forfeiture, would not of itself constitute an offence for which the party carrying the goods or having them in possession would be liable to be arrested, except under the circumstances stated by the 48 Geo. 3. (1) The vessel in which the spirits are contained, the manner of conveying them, the place and mode of concealment, are all circumstances to be taken into consideration, and from them the magistrates must judge whether it is apparent or may be fairly inferred that the spirits were smuggled on shore (2). Whenever a vessel belonging in whole or in part to British subjects, and the owners of which are required to have a licence to navigate it, is found to have been within four or eight leagues of such parts of the coast as are specified in any act of parliament with regard to those distances, or in the British or Irish channels, or elsewhere on the high seas within 100 leagues of the coast; and a person found on board ventures either during the chase or previously to the vessel being taken possession of within the prescribed limits or distance, to unship or *throw overboard the cargo*, or any part of it, except through unavoidable necessity or distress, or for the security and safety of the vessel from the dangers of the sea when she is laden with a legal cargo; *every person* found on board, being a subject of his Majesty, who shall not prove that he was only a passenger, will forfeit £ 100. Officers of the army, navy, or marines, or of customs or excise, by whom the vessel or boat is seized, are required to arrest and detain every such person in order to his being dealt with as a person is liable to by the 45 Geo. 3. c. 121. for having been taken on board a vessel liable to forfeiture for being found or having been at anchor or hovering within such distance of the dominions of his Majesty, with such goods on board as subject the ship or goods to forfeiture; or if he be a seaman or seafaring man, he may be dealt with as directed by the 47 Geo. 3. sess. 2. (3)

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(1) Vide 48 G. 3. c. 84. s. 7. as to arresting and binding over hawkers, &c. offering tea for sale.

(2) Order of Board of Customs, 19 Dec. 1816. Pope, tit. 5.

(3) 49 Geo. 3. c. 62. s. 1. As to the mode in which the persons are to be dealt with, see 57 Geo. 3. c. 87. s. 5. 59 Geo. 3. c. 121. s. 1. 49 Geo. 3. c. 62. s. 8. 56 Geo. 3. c. 104. s. 27.

Of forfeiture and penalties: of uncustomed goods and excise goods: of owner's recovery against master: of the packages and carriages, &c.: of concealing run goods: of offering them to sale. (1)

Goods exported or imported without payment of the duties imposed upon them by law are forfeited to the crown. The subsidy act, 12 Car. 2. c. 4., enacts, that if any goods on which subsidies are due shall at any time after be *laden on board* a vessel in order to be exported, or be *brought* from parts beyond the sea *into* any place or creek in this kingdom or the other dominions of his Majesty by way of merchandize, and *unshipped* in order to be laid on land, the duties due or to be due not being paid or lawfully tendered to the collector or his deputy (2), with the consent and agreement of the controller and surveyor there, or one of them at least, nor agreed for in the custom-house, according to the true meaning of the act, all such goods will be forfeited to the crown (3). But the act provides that if any goods of a merchant born denizen are taken by enemies or pirates on the sea, or perish in a ship that happens to be taken or to perish, when the duties have been duly paid or agreed for, and that fact is duly proved before the treasurer of England, commissioners of the treasury, or chief baron of the exchequer for the time being, by the examination of the merchants if alive, or of their executors if dead, or by two credible witnesses at the least sworn, or other reasonable witnesses and proof on oath; the merchant or his executors may newly ship in the port where the goods were customed, so much other merchandize as is equivalent in custom to the goods lost, without paying any thing for it; provided the proof be recorded and allowed of in the court of exchequer, and certified to the collectors of the customs at the port where the merchandize is so newly shipped without custom (4). The statute 8 Ann. c. 7. also subjects prohibited or uncustomed goods to forfeiture on importation. It enacts that if any sort of goods whatsoever, liable to the payment of duties, be *unshipped*, with intent to be laid on the land, without the customs or other duties being first paid or secured, or if any prohibited goods whatsoever be imported into Great Britain, they will be forfeited. And moreover, all persons concerned in unshipping the prohibited and uncustomed goods, or to whose hands they shall knowingly come after being unshipped, will forfeit *treble* value, together

(1) See division of the subject, ante, 692. 770.

(2) Vide Cro. El. 534.

(3) 12 Car. 2. c. 4. s. 3., and see 5 Geo. 1. c. 11. s. 6. Penalty on master's opening or altering packages in port, 5 Geo. 1. c. 11. s. 7. and 13 & 14 Car. 2. c. 11. s. 5., which imposes £100 penalty on master for uncustomed goods found after clearing.

(4) 12 Car. 2. c. 4. s. 4.

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with the *vessel* and boats, and all horses, cattle, and *carriages* made use of in the landing or conveyance of the goods will be forfeited (1). This statute is not confined in its operation to such prohibitions as were in force at the time when it was passed, but extends also to future statutes; and therefore a party is liable to forfeit the treble value of goods which come to his possession with a knowledge that they were prohibited, though the prohibition was imposed by a statute made subsequently to the 8 Ann. (2) An information for assisting, or being otherwise concerned in unshipping goods, at the time of unshipping them, is sustainable against a person who has directed others to land the goods and to receive them at a certain time and place (3); for personal presence is not necessary to constitute the offence: and if a person who was not present at the running of the goods, or the carrying of them to his home afterwards, pays the men for doing it, it is a *being concerned* within the meaning of the statute, and an information may be supported against him (4). But when a person engaged in smuggling wine had been present at and assisting in unshipping two parcels, but then went away, having, before he went, commanded his servant to stay and assist in getting in other parcels of it, which were taken in accordingly; it is said to have been decided that he was not liable on an information for assisting and being concerned in the unshipping of the last-mentioned parcels at the time of unshipping them, however he might be liable for knowingly taking them into his possession (5). And it is said that the words, tempore exonerationis, or other words of the same import, must be contained in the information for assisting or being concerned in unshipping, in the manner prohibited by the act (6). The information may charge in one and the same count that the defendant was assisting *or* otherwise concerned in unshipping the illegal articles, without being objectionable on the ground of uncertainty or duplicity; and it is the ancient practice in the Exchequer to state the offence in that mode (7). And the alle-

(1) 8 Ann. c. 7. s. 17., and see forfeiture of goods landed without entry and duty, s. 14. and ante, 747, 8; and see as to goods *prohibited to be exported*, 53 Geo. 3. c. 10?. s. 9.

(2) Attorney General v. Saggers, 1 Price, 182 See also upon this act the cases infra, and Attorney General v. Brown, Forrest, 110.

(3) Attorney General v. Lake, Bunb. 277.

(4) Attorney General v. Woodmass, Bunb. 247.

(5) Attorney General v. Flower, Bunb. 227.; and see the explanation, id. 278, & quere.

(6) Attorney General v. Lake, Bunb 277.

(7) Attorney General v. Farr, 4 Price's Rep. 122. Bunbury, 227. 247. 277.

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gation of an offence under the 8 Ann., for being knowingly possessed of foreign leather gloves, is compatible with a charge under the 6 Geo. 3. c. 19. for concealing them to prevent seizure; and the two offences being distinct, the recovery of the penalty of treble value given by the statute 8 Ann. c. 7., does not preclude the crown from proceeding also for the penalty of £200, to which the offender is liable by the statute 6 Geo. 3. (1)

The owners of a vessel which is exposed to forfeiture through the misconduct of the master, in being concerned in an illicit trade, have a remedy prescribed to them by statute for obtaining satisfaction against him. The statute 21 Geo. 3. c. 39. provides, that if the master of a ship shall clandestinely hide or conceal, or allow to be *concealed*, by his mate or seamen, in any part of the vessel, or in any chest belonging to it, any quantity of foreign spirituous liquors exceeding two gallons for each seaman on board, or any quantity of tea above the weight of six pounds, or any quantity of coffee above the weight of nineteen pounds; or if the master shall clandestinely import or suffer to be *imported* any such foreign spirituous liquors or any other *uncustomed* goods, whereby the owner becomes liable to penalties, or the vessel is liable to be forfeited; he will forfeit all the wages due to him, and will also be amenable to the owner for treble the value of all such foreign spirituous liquors, tea, coffee, and other uncustomed goods, over and above the other penalties to which he is liable by law (2). A similar liability is incurred by the mates and seamen of a vessel who are guilty of such a clandestine concealment or importation. (3)

The captains, commanders, or other officers of his Majesty's ships receiving any goods on board, except those designed for the sole use of the vessel, and gold, silver, or jewels, and goods taken in in order to preserve them from being wrecked, and goods ordered by the admiralty to be received on board, are liable to be cashiered, and rendered incapable of serving his Ma-

(1) Attorney General v. Saggers, 1 Price, 182.; and see 11 Geo. 1. c. 30. s. 16.

(2) 21 Geo. 3. c. 39. s. 1.

(3) 21 Geo. 3. c. 39. s. 2.; and they may be sent to serve on board a ship of war, s. 3.; copy of the act to be hung up in every British trading ship, s. 4.; recovery before justices; commitment for three months, s. 5.; no certiorari, s. 7.; limitation of actions, general issue, and treble costs, s. 8.

jesty, on being convicted by the sentence of a court-martial (1); and they are also liable to forfeit the value of the goods, or the sum of £500, at the election of the informer or person suing for it; and the court that passes the sentence is to certify the judgment to the admiralty. (2)

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Relanding, &c.

The statute 5 Geo. 1. c. 11., in order to prevent goods shipped for foreign parts being *relanded* to the prejudice of the revenue, enacts, that if any such goods shall be unshipped or put on shore, (except in case of distress, to save the ship from perishing, or in the presence of an officer of customs), they shall be forfeited; and the master is liable to forfeit the value of the goods; and a person receiving them double their value, unless he protects himself by discovering the offence previously to a seizure being made (3). All goods charged with *excise* duties upon importation, which are unshipped, landed, or delivered out of any vessel before the duties are paid or secured, are *forfeited*, and liable to be seized by the officers of excise (4); and every person who shall unship, land, or deliver any such goods out of a vessel, or assist in so doing, before the excise duties have been fully paid or secured, or shall conceal the goods, or knowingly receive them into his possession, he will forfeit *treble the value* of the goods, to be estimated at the highest price which goods of the best quality of the same kind sell for in London at the time when the forfeiture is incurred (5). When goods, in respect of which excise duties are charged, are fraudulently deposited or *concealed* in any place, with intent to defraud the crown of the excise duties, the goods and packages are forfeited, and may be seized by the officers of excise (6). Where any goods are forfeited under the acts of parliament relating to the duties of excise, all the moveable casks, or other *packages* containing them, and every vessel, boat, cart, and *carriage*, and all cattle used in the removal of them, will be forfeited and may be seized, together with the goods, by any officer of excise. (7)

(1) 22 Geo. 2. c. 33. s. 2. art. 18.

(2) 22 Geo. 2. c. 33. s. 24.

(3) 5 Geo. 1. c. 11 s. 6., the value of the goods is taken at the highest price for articles of the sort.

(4) See as to officers of army and navy, post, 795, 6.

(5) 27 Geo. 3. c. 31. s. 9.

(6) 42 Geo. 3. c. 93. s. 17.; and see as to seizures by army and navy, &c. post; and see as to powers of searching suspected places, post, and 42 Geo. 3. c. 93. s. 17.

(7) 42 Geo. 3. c. 93. s. 18. Penalty on taking another's horse without his consent, for conveying spirits, &c., £20. 45 Geo. 3. c. 121. s. 9.

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Concealing run goods.

Every person knowingly harbouring or *concealing*, or knowingly permitting to be harboured or concealed, prohibited or run goods, liable to any duty of customs or excise, or inland duties, whether he has or has not, or does or does not pretend to have any property or interest in the goods, forfeits treble the value, besides the articles themselves (1); and the single value of goods so forfeited is estimated at the price which the best goods of the like sort sell for in London (2). Persons concerned in smuggling prohibited and uncustomed goods have frequently, in order to prevent the seizure of them, resorted to a practice of pledging them with pawnbrokers in London, and several seizures of such property have been lately made; in consequence of which a public notice has been given to pawnbrokers at the custom-house, cautioning them against taking in pledge any foreign goods that are new and liable to the payment of duties, unless fully satisfied that the duties have been paid; for the commissioners of customs have expressed a resolution to prosecute all such prohibited goods to condemnation, according to law (3).

Selling, buying, and receiving run goods.

Every person offering or *exposing to sale* any prohibited goods or goods pretended to be run, forfeits the goods, which may be seized by the *party* to whom they are offered for sale, or by the officers of customs or excise (4). But the goods must be lodged in the appropriated places belonging to the crown within twenty-four hours, if the seizure be made in any place within the limits of the weekly bills of mortality; or within forty-eight hours, if the seizure be made in any other place (5). The person offering or exposing the goods to sale also forfeits treble the value (6). The goods may also be seized from the *buyer* either by the vender or by any officer of the customs or excise, provided the goods are deposited as we have just mentioned (7); and the buyer also forfeits treble value; but either party first prosecuting the other with effect is exempt from the penalty; though if no prosecution is commenced within a month after the seizure, the warehouse keeper, or officer in whose custody the goods are lodged on their being seized, is to institute proceedings (8). If

(1) 11 Geo. 1. c. 30. s. 16.; and see 8 Ann. c. 7. s. 17. Attorney General v. Saggers, 1 Price, 182.

(2) 11 Geo. 1. c. 30. s. 17.

(3) Order at custom house, 27 May 1818. Pope, tit. 5.

(4) As to officers of army and navy, &c. see post, 795, 6.

(5) 11 Geo. 1. c. 30. s. 18.

(6) 11 Geo. 1. c. 30. s. 19.

(7) 11 Geo. 1. c. 30. s. 20.

(8) 11 Geo. 1. c. 30. s. 21. See 8 Geo. 1. c. 18. s. 10. Hawkers dealing in contraband goods forfeit licence, 50 Geo. 3. c. 41, s. 16.

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a person knowingly *receives* or *buys* goods clandestinely run or imported, before they have been legally condemned, and is convicted thereof by one or more justices of the peace for the district where the offender was found, upon his appearance or default by oath of a credible witness, or by confession, he forfeits £20, one moiety thereof to the informer, and the other to the poor of the parish where the offence was committed; the same to be levied by distress and sale of the offender's goods, by warrant under the hand and seal of such justice as aforesaid; and in default of such distress he may be committed for three months. (1)

Porters, &c. carrying goods.

All watermen, carmen, porters, and other persons employed in *carrying* goods prohibited, run, or clandestinely imported, without the payment of the duties of customs or excise, when the goods are found upon them, and they know of the fraud committed upon the revenue, and are afterwards convicted upon their appearance or default, by one or more credible witnesses, or by confession, before a justice of the peace for the district where the offence was committed or offender found, are liable to forfeit treble the value of the goods; one moiety to the informer, and the other to the poor of the parish; to be levied by distress and sale of the offender's goods; and in default of the penalty being satisfied, the offender is to be committed to prison, to be whipped, and kept to hard labour for any time not exceeding three months (2). Every person undertaking or agreeing by way of *insurance* or otherwise to deliver goods to be imported from parts beyond the sea at any place in England, Wales, or Berwick, without paying the customs or duties payable on importation, or any prohibited goods, or actually delivering or causing to be delivered any goods whatever, without paying the duties when acquainted with the fact, is liable to forfeit the sum of £500 by virtue of a statute of the reign of W. & M., over and above all other forfeitures and penalties to which he was then liable (3). A penalty of £500 was also imposed by the same statute on the person so insured. (4)

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(1) 8 Geo. 1. c. 18. s. 10. Hawkers dealing in contraband goods, forfeit licence, 50 Geo. 3. c. 41. s. 16; and see penalty of treble value on receiver, 8 Ann. c. 7. s. 17. 1 Price, 182. Attorney General v. Saggers.

(2) 9 Geo. 2. c. 35. s. 21.

(3) 4 & 5 W. & M. c. 15. s. 14.

(4) 4 & 5 W. & M. c. 15. s. 15. reward to person discovering the offence; prosecution within twelve months, &c. s. 15 to 19.

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Contracts in fraud of revenue, &c. void, and effect of condemnation in exchequer, &c.

Independently also of the penalties attaching by particular acts of parliament upon different species of contraband trading a *contract* made in contravention of the revenue laws is *void*, and cannot be recovered upon in a court of law; and therefore, where a foreigner, residing at Lisle, sold a quantity of lace, which he knew was intended to be smuggled into England, and which he packed in a peculiar manner, by direction of the purchaser, to facilitate the clandestine importation of it; it was holden that he could not recover the price (1). So where an inhabitant of Guernsey sold a quantity of brandy, which he knew was intended to be smuggled into this country, and which he packed in ankers (2) for the purpose of bsing smuggled; it was held that he could not recover the price (3). So an action cannot be maintained by the partners in a commercial firm, for goods sold by one of them, who lived in Guernsey, and packed by him in a particular manner, for the purpose of being smuggled into this country, though the other partners, who resided in England, knew nothing of the sale (4). Therefore, whenever the vendor has assisted a purchaser in running goods in contravention of the laws of the country, he can neither recover back the goods themselves nor the value of them (5). And it is clearly settled that a bond, bill of exchange, or other security, which is founded on a smuggling consideration, is invalid in the hands of the party to the illegal transaction (6). But the contract may be enforced when it can be established without calling in aid the illegal transaction; and if goods are bonâ fide sold, and are delivered in the fair course of trade, the vendor may recover the price of them, although they are afterwards smuggled into this country (7). And when two partners, one of whom was an inhabitant of Dunkirk, and the other a native of that place, sold a quantity of tea, and delivered it to the purchaser, knowing it was intended to be smuggled into England, but taking no part in the adventure, except by selling it, as they would have done to any other person in

(1) Waymell v. Reid, 5 T. R. 599.

(2) An anker contains only sixty-four wine quarts; the cask must now contain sixty gallons, 45 Geo. 3. c. 121. s. 1.

(3) Clugas v. Penaluna, 4 T. R. 466.

(4) Biggs v. Lawrence, 3 T. R. 454.

(5) Vandych v. Hewitt, 1 East, 96.

(6) Guichard v. Roberts, 1 Bla. Rep. 445. Chitty on Bills, 5 Ed. 96. 3 M. & S. 117. Holt, C. N. P. 105. 4 Taunt. 63.

(7) Clugas v. Penaluna, 4 T. R. 466. Hodgson v. Temple, 5 Taunt. 181. 1 Marsh, 5.

the ordinary course of trade; it was held that the contract of sale was not vitiated by the illegality (1). So, when the vendors of spirituous liquors, who were distillers, delivered them by the orders of the purchaser, under permits which they obtained, authorizing the delivery of the goods to a third person as the buyer and for his use, at a rectifying distillery, which was entered with the excise officers as the distillery of that person, when it was in fact the property and carried on for the benefit of the defendant, who kept a licensed retail shop for the sale of spirituous liquors (2), which the vendors knew; it was held that the contract of sale was not illegal, and that therefore they were in a condition to recover the price (3). So, on an action of assumpsit being brought for not accounting for goods delivered to the defendant, to be sold on account of the plaintiff, it was held by Lord Ellenborough that it was not a sufficient answer to shew that the goods paid no duty on exportation, and that the vessel cleared out in ballast, without also proving that the illegal evasion of the duty formed part of the agreement between the plaintiff and defendant (4). The vendors of a quantity of tobacco, consigned to them from Guernsey to be disposed of, who had made a regular entry of it on importation, but had not entered themselves at the excise office, nor procured a licence as dealers in tobacco (5), and who at the desire of the defendant had sent it out to him without a permit, were held entitled to recover the value, there being in this instance no fraud upon the revenue, nor any clause in the statute making the contract of sale illegal, and the illegality, if any existed, consisting only in the breach of a particular regulation, the compliance with which was enforced by a specific penalty (6). A judgment of condemnation in the court of exchequer, on the ground that rum was adulterated, is conclusive evidence of that fact in answer to an action for the price of it; but there is a difference between a judgment of condemnation and a judgment in an action for penalties, because the former operates in rem, and the latter only in personam, and therefore the latter judgment is not evidence with respect to persons who are not parties to

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(1) Holman v. Johnson, Cowp. 341. Waymell v. Reed, 5 T. R. 600.

(2) Vide 26 Geo. 3. c. 73. s. 54.

(3) Hodgson v. Temple, 5 Taunt. 181.

(4) Catline v. Bell, 4 Campb. 183.

(5) But semble, that one instance of selling does not make a person a dealer within 29 Geo. 3. c. 68. s. 70. Johnson v. Hudson, 11 East, 180. Rex. v. Little, 1 Burr. 609. The King v. Buckle, 4 East, 346. and post.

(6) Johnson v. Hudson, 11 East, 181.; and see 30 Geo. 3. c. 40. s. 4. 29 Geo. 3. c. 68. s. 70.

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it (1). *A condemnation* of goods in the court of exchequer is conclusive evidence against all the world; and the question of forfeiture cannot be agitated again in any tribunal whatever (2). But it has been held that a condemnation by the commissioners of excise will not have the same conclusive operation (3). If by the smuggling or wrongful or negligent act of a third person, a ship or goods become forfeited and are seized, the owner may recover compensation in an action against the wrongdoer. (4)

Bringing to, searching, &c. Ships, &c. breaking open doors, boxes, &c. searching houses, &c. (5)

The master of a vessel arriving from foreign parts must not presume to pass the usual places appointed for stationing officers of the revenue on board vessels, and for relieving and landing the officers, or such other places as may be hereafter appointed for that purpose by the commissioners of the customs, without *bringing-to* and receiving the revenue officers on board; and when outward bound, he must not pass without bringing-to at the usual and appointed places, for the purpose of the cargo being examined, and of relieving or landing the officers; except in a case of unavoidable necessity or distress of weather, or other inevitable accident, to be established to the satisfaction of the commissioners of the customs; and every master who so passes without bringing-to for these purposes, forfeits £100 (6). And if a vessel, liable to seizure or examination by any act of parliament now in force, does not bring-to on being required to do so, or on being chased by a vessel in his Majesty's navy having the proper pendant and ensign hoisted, or by a vessel employed in the prevention of smuggling under the authority of the commissioners of the treasury, the commissioners of the admiralty, or the commissioners of customs or excise, having a pendant and ensign hoisted of such description as his Majesty, by order in council, or by royal proclamation under the great seal of the united kingdom, shall from time to time order and direct, it is lawful for the captain of his Majesty's vessel so employed to shoot at or into the vessel so liable. And he is indemnified against all the consequences; and if a person is wounded or killed, and a charge is preferred before a justice or other competent person against those employed in his Majesty's service, they are to be admitted to bail. (7)

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(1) Hart v. M'Namara, 4 Price, 154.

(2) Scott v. Shearman, 2 Bla. Rep. 977.

(3) Henshaw v. Pleasance, 2 Bla. Rep. 1171.; sed quære, and vide Reynolds v. Kennedy, 1 Wils. 232.

(4) Blewitt v. Hill, 13 East, 13. Baker v. Liscoe, 7 T. R. 171.

(5) See division of subject, ante, 692. 770.

(6) 26 Geo. 3. c. 40. s. 22.

(7) 56 Geo. 3. c. 104. s. 8. Penalty of £500 on hoisting the pendant when not authorized, s. 9.

Powers of searching Ships, Houses, &c.

The power of *searching* vessels was conferred on the officers of the revenue by the stat. 13 & 14 Car. 2. c. 16. s. 4. The officers of customs, and their deputies, were authorized by this act to go on board of any vessels outward bound, as well ships of war as merchant ships, and to *bring on shore* all prohibited or uncustomed goods, except jewels, and to bring on shore into his Majesty's storehouse, from inward-bound vessels, all small parcels of fine goods or other goods, which are found in cabins, chests, trunks, or other small packages, or in any private or secret place, in or out of the hold of the vessel, and which occasion just suspicion that they were intended to be fraudulently conveyed away. And all other sorts of goods whatsoever for which the duties were not paid or compounded for, within 20 days after the first entry of the ship, to remain in the storehouse until the duties are satisfied, unless the officers see just cause to allow a longer time (1). And, in order to enforce this law, the officers may freely *stay* and remain on board until all the goods are delivered and discharged out of the vessel (2). And if the master, or any other person, suffer a package to be opened on board the vessel, and the goods to be embezzled, carried away, or put in any other form or package, after the ship arrives in her port of discharge, he will forfeit £100 (3). After this provision was made, it not unfrequently happened that packages sent to his Majesty's storehouse by the officers of customs, in pursuance of the act, and others brought on shore by virtue of a special sufferance or order from the commissioners or principal officers of the customs, to be examined before entry and payment of the duties, were found to enclose lace and other fine goods, which lay in a small compass, and which there was reason to believe would not be entered at the custom-house unless they should happen to be discovered by the revenue officers. The statute 5 Geo. 3. c. 43., in order to remedy this evil, provides that all goods found enclosed and concealed in chests or packages, or amongst other goods, after they have been carried to the king's storehouse by the officers of the customs in pursuance of the 13 & 14 Car. 2. which have not been entered and paid for within 20 days after the first entry of the

And see 24 G. 3. c. 47. s. 23. extended to all statutes passed and to be passed by 47 G. 3. sess. 2. c. 66. s. 32. The pendant has now a red field with a regal crown, and the ensign a red jack with a union jack and a regal crown. Order in Council, 1st Feb. 1817 Pope, tit. 5.

(1) Post.

(2) 13 & 14 Car. 2. c. 11. s. 4.

(3) 13 & 14 Car. 2. c. 11. s. 4.; and see 26 Geo. 3. c. 40. s. 8.

Powers of searching Ships, Houses, &c.

ship in which they were imported; or goods found concealed in packages brought on shore by special sufferance, or order from the commissioners or principal officers of the customs, at the request and application of the proprietor or his agent, and not particularly specified in the application, will be forfeited and liable to be seized, one half of the benefit of the forfeiture being given to the person seizing or informing, and the other half to the crown (1). The statute 13 & 14 Car. 2. also provides that if after the *clearing* of a vessel by the officers appointed for managing the customs, or their deputies, and discharging the watchmen or tidesmen from attendance, any goods are found on board that have been *concealed* from the knowledge of the persons appointed to manage the customs, or for which the duties on *importation* have not been paid, the master or purser will forfeit £100 (2). If, after the arrival of a vessel laden with goods and bound to Great Britain, either when within the limits of any of the ports of Great Britain, or within four leagues of the coast thereof, *bulk* is *broken*, or any part of the cargo unladen or unshipped with intention to be laid on land, or unshipped for any other purpose, within the limits or distance aforesaid, before such vessel arrives at the proper place for the discharge of her cargo, or any part of it, and is there duly *authorized* to unlade by the proper officer of customs, the master and the mate, or other person next in command, will respectively forfeit £200; except in case of unavoidable necessity and distress of weather, or other unavoidable accident, necessity, or distress, of which necessity and distress or other unavoidable accident, the master is to give notice, and together with two or more of the mariners on board, make proof upon oath before the collector or other chief officer of customs (3). If, upon the arrival of the ship within the limits of a port in Great Britain, for the discharge of the cargo, there are any goods which, from necessity or from the nature of the cargo, must be unavoidably stowed either in the cabin or between the decks, or upon the decks, or in the steerage, forecastle, or other places out of the main hold of the vessel, except such part of the cargo as is stowed in the chains, or in other parts on the outside of the ship, the officers who first go on board are required, before they leave the vessel, to *mark and seal* the several packages,

(1) 5 Geo. 3. c. 43. s. 1.; and see 5 Geo. 1. c. 11. s. 4.

(2) 13 & 14 Car. 2. c. 11. s. 5.; and see 5 Geo. 1. c. 11. s. 4.

(3) 26 Geo. 3. c. 40. s. 8. Penalty on master's opening or altering packages in port. 5 Geo. 1. c. 11. s. 7.

as the commissioners of the customs shall direct. And the mark or seal is not allowed to be altered, defaced, or broken, before the goods contained in the packages are landed, either at the legal quays, or at other places by the sufferance of the commissioners, and under the authority of an order from the proper landing waiters, and in the presence of some superior officer appointed by the commissioners to see the packages opened (1). If the seal is defaced or altered, the master and mate are liable to a penalty of £200 (2). The officers of *excise* may also go on board a vessel when within the limits of a port of this kingdom, and rummage and search in like manner as the officers of the customs for all exciseable commodities, and for all coffee, tea, cocoa nuts, chocolate and cocoa paste, and seize all such as are forfeited, and are unshipping or unshipped without entry and payment of the legal duties (3). Officers of customs or excise, on producing their warrants or deputations, if required to do so, may enter on board a *coasting* vessel, which is within the limits of a port of this kingdom, and may rummage and search for prohibited and uncustomed goods. The officers are empowered to remain on board during the whole time the ship remains within the limits of a port; and if any persons molest them in their duty they will forfeit £100 (4). The revenue officers authorized to examine a vessel, or the cargo on board, must at all times, in order to enable them to perform their duties, have free access to the cabin and every other part of the ship; and if any places within the cabin, forecastle, steerage, or any other part of the vessel, or any boxes, chests, or other packages, are locked or fastened, and the keys withheld, and the places not opened for the officers on their requiring it of the master, the officers, if they are of a degree superior to tidesmen or watermen, are empowered to open them in the best manner they can, and are indemnified in so doing; but if such officers are only in the class of tidesmen or watermen, they are required to send for their superior officer, who may then cause the fastened place to be opened. (5)

Powers of searching Ships, Houses, &c.

When goods charged with customs or other duties are landed or conveyed away without due entry of them having been made (6), and the customer or collector, or his deputy, agreed with, and oath of the fact is made before the lord treasurer or

Searching-houses.

(1) 26 Geo. 3. c. 40. s. 9.
(2) 26 Geo. 3. c. 40. s. 10.
(3) 11 Geo. 1. c. 30. s. 1.
(4) 9 Geo. 2. c. 35. s. 29.
(5) 26 Geo. 3. c. 40. s. 23.
(6) See as to entry, ante 748, 9.

Powers of searching Ships, Houses, &c.

barons of the exchequer, or chief magistrate of the place where the offence is committed, or the place next adjoining thereto, a warrant may be issued to enable any person, with the assistance of a sheriff, justice of peace, or constable, to enter into any house in the day-time where such goods are suspected to be concealed, and in case of resistance to break open the houses and seize and secure the goods concealed; and all officers and ministers of justice are bound to assist in the enforcement of this law (1). But no house can be entered by virtue of it, after the lapse of a month from the time of the commission of the offence (2). And if the information upon which any house is searched should happen to be false, the statute provides that the party injured may recover his damages and full costs against the informer in an action of trespass (3). The statute 13 & 14 Car. 2. also enabled any person, authorized by *writ of assistance* under the seal of the court of exchequer (4), to take a constable, headborough, or other public officer inhabiting near to the place (5), and to enter in the day-time into any *house*, shop, cellar, warehouse, or other place; and if resisted to break open doors, chests, trunks, and other packages, to seize and bring away from thence *all* prohibited and uncustomed goods, and to secure them in the king's storehouse in the port next to the place where the seizure is made (6). The writs of assistance issued by virtue of this act, under the seal of the court of exchequer, are not vacated or determined by the death or resignation of any of the commissioners named therein, or in consequence of the revocation of the patent by which the commissioners were appointed, but every such writ will have its full operation, and be valid and effectual, during the whole of his Majesty's reign. And every writ of assistance issued during any succeeding reign will in like manner be determinable only upon the demise of the crown. And due obedience must be paid to it accordingly by the officers and ministers, vice-admirals, jus-

(1) 12 Car. 2. c. 19. s. 1.

(2) 12 Car. 2. c. 19. s. 2. Vide per Willes J. Lochyer v. Offly 1 T. R. 261. as to hovering act. Cooper v. Boot. 1 T. R. 535. 3 Esp. Rep. 135.

(3) 12 Car. 2. c. 19. s. 4. 13 Car. 2 c. 7. 1 Ann. st. 1. c. 13. s. 2. 9 Ann. c. 6. s. 2. 3 Geo. 1. c. 7. See as to this remedy against the officer, post. Bostock v. Saunders, 3 Wils. 431. 437. 2 Bla. Rep. Leglise v. Champante, 2 Stra. 820. Cooper v. Boot, 1 T. R. 535. 3 Esp. Rep. 135. et infra.

(4) See the writ of assistance, distinguished from a warrant, as to the action against the officer, Boot v. Cooper, 3 Esp. 138. 145.

(5) 13 & 14 Car. 2. c. 11. s. 5. See as to the writ of assistance, 2 Bla. Rep. 914. 3 Esp. 138. 145.

(6) Vide Hill v. Barnes, 2 Bla. Rep. 1135.

tices of the peace, mayors, sheriffs, constables, bailiffs, headboroughs, and all other the officers, ministers, and subjects mentioned in the writ (1). According to an order of the board of customs of the 2d April 1817, no writ of assistance is in future to be delivered to any officer of customs, unless he previously makes oath before a magistrate that he has received information that smuggled goods are lodged in a house or houses (stating the number of houses if more than one), that his informer is a person upon whom he can depend, and that the goods have been seen on the premises, as he is informed and verily believes. (2) Powers of searching Ships, Houses, &c.

Other provisions were also made by the statute 6 Geo. 1. c. 21. with respect to the seizure and subsequent disposition of property taken on suspicion of being employed in clandestine trade, a practice having formerly prevailed of purposely placing goods in the way of the officers, in order that they might be seized as smuggled, and afterwards bringing an action against him to endeavour to obtain a large compensation for the detention of property of small value (3). The act provides, that if prohibited or uncustomable goods are found by an officer of customs in the custody of a person being in a bark, hoy, lighter, barge, boat, or wherry, on the water, or coming directly from the waterside, without the presence of an officer (4); or if such goods are found according to the information of one or more credible persons in a house, shop, cellar, warehouse, room, or other place, on a search made there according to the stat. 13 & 14 Car. 2. c. 11. (5); the officer may *stop* and put the goods in the king's *warehouse*, in the port next to the place where the stoppage is made, to remain there until the claimant shall make proof, by *oath* or otherwise, to the satisfaction of the commissioners of the customs, if the stoppage is made in London or Edinburgh, that the duties have been paid or secured, or that the goods have been brought in a lawful way of trade, and that the claimant verily believes the duties to have been paid or secured—or, that the goods have been compounded for or condemned in the court of exchequer at Westminster or Edinburgh, or been otherwise delivered by writ of that court; and when prohibited goods are concerned, that they have been compounded Detaining Property till Proof on Oath of Payment of Duties, &c.

(1) 54 Geo. 3. c. 46.

(2) Order of board of customs, 2 April 1817, Pope, 10. note a.

(3) 6 Geo. 1. c. 21. s. 39. Vide Salomon v. Gordon, 2 Bla. Rep. 813.

(4) Vide also as to this, 13 & 14 Car. 2. c. 11. s. 7. ante, 762, &c.

(5) 13 & 14 Car. 2. c. 11. s. 5. ante, 789.

Powers of searching Ships and Houses, and detaining Goods.

for, or condemned, or otherwise delivered; in which case the goods are to be restored without delay or charge: and when the goods are stopped in any other port besides London or Edinburgh, must establish a similar case, and deliver the proof to the collector, or in his absence to one of the other principal officers of customs, whose duty it is to transmit it to the commissioners for their directions touching the immediate delivery of the goods, without charge to the claimant, or for the seizing and prosecution of them, as the commissioners shall see cause (1); nevertheless such proof is to be made within ten days after the goods have been stopped, otherwise they are seizable and liable to be prosecuted as prohibited or uncustomed goods unlawfully imported. On a prosecution (2) when no application (3) has been made to the commissioners or officers, the proof necessary to protect the property lies upon the claimant, who must establish his property in the goods claimed; and if a dispute arises, he must prove that the duties were paid or secured, or that the goods had been compounded for or condemned, or otherwise delivered by writ out of the court of exchequer, or bought in a lawful way of trade (4). If the claimant recover against the officers, he is to receive the value of the goods and reasonable costs of suit (5). Where the commissioners order the delivery of the goods, and the owner sustains any damage by the stoppage, he is not only to receive them back without any charge or delay, but may sue the seizing officer for any reasonable damages he may have sustained by the detention (6). An action of trover has been held to be maintainable against the custom-house officers, for seizing herrings and carrying them to the king's warehouse, when they were not seizable in point of law. (7)

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(1) 6 Geo. 1. c. 21. s. 39.

(2) This word refers to prosecution in the exchequer, and not to an action of trespass. Salomon v. Gordon, 2 Bla. Rep. 813. Vide 12 Geo. 1. c. 28. s. 8. 23 Geo. 3. c. 70. s. 35. as to excise or inland duties.

(3) 6 Geo. 1. c. 21. s. 40.

(4) 6 Geo. 1. c. 21. s. 41. The onus to protect *foreign* goods, seized for nonpayment of customs or excise duties, lies on owner, by 12 Geo. 1. c. 28. s. 8., 2 Bla. Rep. 814. and proof of excise or inland duties lies, in all cases, on the owner, by stat. 23 Geo. 3. c. 70. s. 35.

(5) 6 Geo. 1. c. 21. s. 41. 12 Geo. 1. c. 28. s. 8.

(6) 6 Geo. 1. c. 21. s. 42.; and see s. 43. that officers and owners may sue respectively.

(7) Tinkler v. Poole, 5 Burr. 2657. 3 Wils. 146. sed quære, for it is said in 3 Wils. that the goods were condemned by the commissioners Vide 2 Bla. Rep. 813, & 1174.

Searching Places for Exciseable Goods.

The statute 42 Geo. 3. c. 93., in order to enable the officers of excise to discover goods fraudulently concealed which have not paid the excise duties, enacts that if an excise officer has cause to suspect that such goods are deposited or concealed in any place within the cities of London or Westminster, or within the limits of the chief office of excise in London, then upon oath made by the officer before the commissioners of excise for the time being, or any two or more of them, or when the place is in any other part of Great Britain, upon oath made by the officer before one or more justices of the peace for the county where the officers suspect the goods to be deposited or concealed, the ground of suspicion being set forth in the charge, the commissioners or the justice of the peace before whom the oath is made may, if they think proper, issue a special warrant under their hand and seal to authorize and empower the officer, by day or by night (provided that if it be in the night a constable or peace officer be present), to enter into all *places* in which he shall suspect such goods to be so deposited or concealed, and to seize and carry away all goods which he shall find so forfeited, and the packages containing them (1). Any constable or peace officer, on being requested by the officer of excise, is bound to attend him to be present at the execution of the warrant; and a person obstructing or hindering an officer so authorized or empowered, or any other person acting in his assistance in the execution of the warrant, in entering a place where he suspects the goods to be deposited or concealed, or in seizing or carrying them away, or the packages containing them, or otherwise in the due execution of the warrant, will forfeit the sum of £100 (2). Officers of excise who entered and searched the house of a tallow-chandler and maker of soap in the night-time, under the authority of the provisions of the statute of Queen Anne (3), which require a peace officer to be present, were held liable to an action of trespass, because they were attended only by a person who was not a regular officer, though he had lately been a headborough, and had his name with that description upon the door of his house, and still attended the rotation justices as an apprehender of felons (4). The court held that

(1) 42 Geo. 3. c. 93.

(2) 42 Geo. 3. c. 93. s. 17.; & see as to tea, coffee, &c. 10 Geo. 1. c. 10. and s. 13., which is now in force.

(3) 8 Ann. c. 9. s. 10. & 10 Ann. c. 19. s. 12. and stat. 11 Geo. 1. c. 30. s. 21. defined what was night. See as to candles, 23 Geo. 2. c. 21. s. 34.

(4) Hill v. Barnes, 2 Bla Rep. 1123.

Searching Places for exciseable Goods.

it was incumbent upon the defendants to take care that they had a regular peace officer with them; and it was observed that when officers are appointed for a particular district within a county, it is necessary that the accompanying officer should be an officer of the district; the reason being that the subject may not be unnecessarily terrified by having his house entered in the night by officers with whom he cannot be expected to be acquainted (1). The court of king's bench will not grant a rule to prevent the seizure of goods by officers of the revenue, on the ground that the right to seize is questionable. (2)

By what Officers, &c. Seizures, &c. may be made.

The practical enforcement of the revenue laws by making seizures is committed to the officers of customs and of excise, to persons not regular officers appointed by the commissioners for making a particular seizure, and officers of the army and navy. The officers of excise and of customs are now placed on an equal footing, their powers being made co-extensive by a late statute (3). The officers of customs are invested by this act with the like powers and authorities for the examination, seizure, detention, removal, and prosecution of any boat or vessel, cart or other carriage, horse or cattle, or goods forfeited under the laws of excise, as were formerly only exercised by the excise officers; and the officers of excise are invested with the like powers and authorities for the examination, seizure, detention, removal, and prosecution of any vessel, carriage, cattle, or goods forfeited under the laws relating to the customs, as the custom officers were formerly allowed to exercise (4). And antecedently to the passing of this act, it had been determined that the authority of a custom-house officer to seize uncustomed goods, or the carriage and horses removing them, is not confined to the limits of the particular port of which he is denominated an officer in his deputation from the commissioners of customs (5). The commissioners of customs in England and Scotland have also a power to grant a deputation *to any person* to make seizures of wine, spirituous liquors, tea or tobacco, or

(1) Per Blackstone J., Hill v. Barnes, 2 Bla. Rep. 1135.

(2) The King v. Commissioners of Excise, 2 T.R. 381. id. Index, tit. Excise.

(3) 56 Geo 3. c. 104. s. 1.

(4) 56 Geo. 3. c. 104. s. 1. and see 24 Geo. 3. sess. 2. c. 67. s. 29. 55 Geo. 3. c. 118. s. 6. 9 Geo. 3. c. 6. (misprinted 9 Geo. 1.) Pope, 5. reg. 42. 33 Geo. 2. c. 9. originally confined to customs. 13 & 14 Car. 2. c. 11. s. 15. Burn, J. tit. Excise and Customs, s. 1.; and see as to the Isle of Man, 50 Geo. 3. c. 62 s. 5.

(5) The King v. Barfoot and others, 13 East, 506.

any prohibited East India or French goods, or any other goods specified in the deputation, which may be subject to seizure under the laws relating to the revenue of customs or excise, or any vessel, boat, horse, cattle, or carriage used in the importation or removal of such prohibited or run goods, although such person does not hold any office of customs at any specified place; and a person so deputed may make seizures in like manner as officers of customs, and will be subject to the same penalties as those officers; and all seizures made by a person so deputed, are to be prosecuted and recovered in the like manner as seizures made by the officers of customs and excise (1). And the powers which we shall presently see were conferred on half-pay officers of the army and navy (2) by statute 56 Geo. 3. c. 104. have been since extended to persons authorized and appointed by any *warrant* or other *instrument* granted by the commissioners of the *treasury* or *customs* or *excise* in England, Scotland, or Ireland, to make such seizures as are mentioned in that act, and employed to act in or with the boat service established for the prevention of smuggling (3). Moreover, the powers, authorities, exemptions, and exceptions, and all privileges and protections as to maintaining or defending any suit and pleading therein, or any costs thereon, in relation to any thing done or that may be done by any officer of customs or excise, under the acts of parliament for the protection of the revenues of the customs and excise, or prevention of smuggling, and every thing therein contained relating to any vessels or boats made subject to forfeiture by any act in force for the prevention of smuggling, or by reason of being found with prohibited or uncustomed goods on board, within certain distances of the coasts of his Majesty's dominions, or to any goods laden on board such vessel or boat, or any guns, furniture, ammunition, tackle, or apparel thereof, or to any master or other person on board of such vessel or boat, extend and apply in all cases and for all purposes for the benefit of *commissioned officers* of his *Majesty's army, navy,* and *marines* (4). The power of seizure was afterwards extended to any warrant or other *non-commissioned* officer, not being below the rank of a sergeant in the army, and who is approved of by the commanding officer of the regiment

By what Officers Seizures to be made.

How Warrant or Noncommissioned Officers may seize.

(1) 57 Geo. 3. c. 87. s. 20.
(2) Infra, 797.
(3) 57 Geo. 3. c. 87. s. 4.
(4) 45 Geo. 3. c. 121. s. 16.; and see regulation as to employing detachments of troops for purposes connected with the revenue, Pope, tit. 5.; and as to the Isle of Man, 50 Geo. 3. c. 62. s. 5.

By what Officers Seizures to be made.

in which he serves, as proper and qualified for the service, to patrole with any number of soldiers under his command, for the purpose of preventing illicit practices on the revenue, and to seize, without having any deputation or commission from the commissioners of the customs or excise, any vessel or boat, cart or carriage, or cattle, or any goods or things whatsoever, which are subject to forfeiture by the laws relating to the revenue; provided that he lodge his seizures in the king's warehouse, at the nearest custom-house to which it can be conveniently brought, and there deposit the same in the custody of an officer of the customs or excise, and in all respects conform to the regulations by which the revenue officers are bound in cases of seizures (1). Some doubts having been entertained whether this provision authorized non-commissioned officers of the army to detain persons liable to be arrested for offences against the revenue, it was afterwards provided that all the powers and authorities contained in any act of parliament for the prevention of smuggling, in relation to the arresting and detaining persons, should extend to every warrant or non-commissioned officer of the army, whose rank is not inferior to that of a sergeant, and who is approved of by the commanding officer of the regiment in which he serves (2). Further, the provisions in relation to the making of seizures by any officer of his Majesty's army, or to the arresting or detaining any person liable to be arrested or detained under acts of parliament passed for the prevention of smuggling, extend in like manner to all officers of the militia while embodied, or of the volunteers, or any other of his Majesty's *military* forces, while they are on service and subject to the provisions of the mutiny act (3). The *commanders* of his Majesty's vessels of war, and commissioned, warrant, or petty officers specially authorized by them, are also empowered by law, without any deputation from the commissioners of customs or excise, to seize goods or vessels that are liable to forfeiture by reason of infringements of the laws relating to the revenue. But the commander was required, by the statute which gave this authority, to cause the seizure to be brought to his Majesty's warehouse at the nearest custom-house to which it can conveniently be brought, and lodge it there under the charge of

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(1) 47 Geo. 3. sess. 2. c. 66. s. 30. and see 50 Geo. 3. c. 62. s. 5. as to Isle of Man.

(2) 48 Geo. 3. c. 84. s. 5.

(3) 47 Geo. 3. c. 66. sess. 2. s. 16; and see as to Isle of Man, 50 Geo. 3. c. 62. s. 5.

the proper officer of customs or officer of excise, and must conform to the regulations regarding the seizure to which such an officer is subjected (1). However, goods or vessels so seized for a breach of the laws of excise, may now be brought to the excise warehouses, and placed under the charge of the excise officer, provided the commander making the seizure shall deem it expedient (2). The statute 56 Geo. 3. c. 104. also provides that any officer of the *army* or *navy* on *half-pay*, authorized by warrant or other instrument under the hands of the commissioners of the *treasury*, or by a deputation from the commissioners of customs or excise, may seize, within the limits specified in such warrant or instrument, any wine, spirituous liquors, tea or tobacco, or any prohibited East India or French goods, or any other goods specified in such warrant, which may be subject to seizure under the laws relating to the revenue, or any vessel, boat, horse, cattle, or carriage used in the importation or removal of prohibited or run goods (3); and if any officer on half-pay, military or naval, so authorized, makes any collusive seizure, or delivers up, or agrees to deliver up, or forbear to seize articles liable to seizure, or takes any bribe or gratuity for the neglect or non-performance of his duty in relation to any such goods or the seizure thereof, he forfeits £500, and is rendered incapable of serving his Majesty in any office or employment, civil or military; and any person making any proposal or offer to induce such officer to neglect his duty, forfeits £500, whether the offer is accepted or not (4). The seizure is to be prosecuted, recovered, and disposed of under the directions of the commissioners of customs or excise, in the same manner as if made by a revenue officer; and officers on half-pay so authorized, enjoy the same immunities and protections as officers of the customs and excise, but no authority is given to them to make seizures for violation of the navigation acts. (5)

By what Officers Seizures to be made.

Half pay Officers.

Same Powers as other Officers to take Goods or Persons.

The *commissioners of customs* were empowered, by the consolidation act, 27 Geo. 3. c. 32., to authorize the restitution of goods or vessels, boats, horses, cattle, or carriages, seized as forfeited under the statutes relating to the *revenue of customs*. The 27 Geo. 3. provides that these commissioners, after evidence has been given to their satisfaction that the forfeiture arose

Restoration of Property and Remission of Penalties, &c. by Commissioners of Customs, Excise, or Treasury, the Attorney General or Justices of the Peace.

(1) 26 Geo. 3. c. 40. s. 27.
(2) 41 Geo. 3. U.K. c. 91. s. 6.
(3) 56 Geo. 3. c. 104. s. 2.
(4) 56 Geo. 3. c. 104. s. 3.
(5) 56 Geo. 3. c. 104. s. 5.

Restoration of Property, &c.

without any fraudulent intention in the proprietor, may order restoration to be made to him in such manner and on such terms and conditions as appear to the commissioners to be reasonable, and as they think fit to direct (1). But this statute being confined in its operation to seizures made under the laws relating to the revenue of customs, it became necessary to invest the commissioners with more extensive powers. The statute 51 G. 3. c. 96. accordingly enacts, that the authority given to the commissioners of customs by the 27 Geo. 3. shall extend to authorize them, according to their respective jurisdictions, to order any goods, or any vessels, boats, horses, cattle, or carriages, seized as forfeited either by officers of customs or by any other person, *by virtue of acts of parliament made for the protection of trade, the benefit of commerce, or the encouragement of navigation, or of any act of parliament relating to the department of customs*, to be restored to the proprietor, whether they have been seized as forfeited in Great Britain or on the high seas, or in any other of his Majesty's dominions, settlements, or plantations, whenever evidence is given to the satisfaction of the commissioners, according to their respective jurisdictions, that the forfeiture arose without a fraudulent design in the proprietor; and also whenever the seizure has been made by any such officer or other person in any of his Majesty's settlements or plantations, or on the high seas, and it is made apparent to the commissioners that the seizure was occasioned by the proprietor's having acted in conformity to an order issued by the governor or chief officer of the settlement or plantation on a particular emergence (2). The restitution is to be made in such manner and on such terms and conditions as the commissioners deem reasonable, and as they think fit to direct; and provided the terms are complied with, the officer cannot lawfully proceed to condemnation; but the proprietor is not entitled to any recompence or damage on account of the seizure, or to maintain any action in respect of it (3). But although if any terms were imposed they must be complied with, the commissioners have authority to make an order, merely stating that they are satisfied that no fraud was intended on the part of the masters or proprietors of the vessel seized, and that they have therefore ordered a restoration of the goods, without engrafting any terms whatever upon the order for restoration; and the

(1) 27 Geo. 3. c. 32. s. 15.
(2) 51 Geo. 3. c. 96. s. 1.
(3) 51 Geo. 3. c. 97. s. 2.

Restoration of Property, &c.

court of exchequer, under such circumstances, will stay the proceedings on a writ of appraisement, although the application be made at the instance of the crown; but if the writ has been regularly issued, the court will not order it to be quashed, but will direct the proceedings on the writ of appraisement and indenture of seizure to be stayed (1). The *Commissioners of Excise* also, on evidence being given to their satisfaction of the absence of any fraudulent design on the part of the proprietor, or person having the custody of the property, are empowered to order goods, vessels, boats, horses, cattle, or carriages, seized as forfeited by virtue of the laws relating to the revenue of excise, to be restored to the claimant, in such manner and on such terms and conditions (2) as they deem reasonable and think fit to direct; and the property cannot be proceeded against for condemnation if the terms are complied with, though the proprietor will not be entitled to be recompensed for any damage he may have sustained (3). A power has been also conferred by a recent statute on *the Board of Treasury*, to direct forfeited property to be restored, and to remit or mitigate any forfeitures or penalties incurred under the laws relating to the customs or excise, or to navigation and trade, either before or after an adjudication has taken place, whether in a court of law, or before a commissioner of excise or justice of the peace (4). The commissioners of the treasury are empowered by this statute, whenever they shall think proper, to make an order under their hands, to direct any ships or goods whatever, seized as forfeited by virtue of any act of parliament relating to the revenue of customs or excise, or made for the regulation of trade and navigation, to be restored to the proprietor, on the terms mentioned in the order; and they are also empowered to mitigate or remit any penalty or forfeiture, or any part of a fine or penalty incurred under the laws relating to the customs or excise, or the statutes made to regulate the trade and navigation of the kingdom (5). The commissioners may impose such terms, with regard to *costs* and otherwise, as under the circumstances of the case appear to them to be reasonable; and no person will be entitled to the benefit of the order unless the terms contained in it are complied with (6). The statutes that have from time

(1) In re ship Maria, 1 Price, 4.
(2) Case of the ship Maria, 1 Price, 4. supra.
(3) 47 Geo. 3. sess. 2. c. 30. s. 19.
(4) 54 Geo. 3. c. 171. s. 1.
(5) Ibid.
(6) 54 Geo. 3. c. 171. s. 2. Case of the Maria, 1 Price, 4. supra.

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to time been made upon this subject enable a party, when the circumstances under which the seizure has been made are such as to entitle him to a restoration of his property, under the provisions that have just been mentioned, to make an application for that purpose, either to the commissioners of customs, the commissioners of excise, or the commissioners of the treasury; and the commissioners of the treasury will sometimes afford relief when it has been unsuccessfully applied for to the commissioners of customs or excise. A judgment of condemnation in the court of exchequer has been set aside by the court on an affidavit, setting forth, among other grounds of excuse for not entering the claim within the usual period of fourteen days, that a memorial had been presented to the lords of the treasury, which was then under consideration. (1)

The *practice*, in order to obtain restitution, or a mitigation of the penalty under these statutes, is for the party who conceives himself entitled to relief to present a *memorial* or *petition* to the commissioners, containing a statement of the facts favourable to the application, and an affidavit of the truth thereof, accompanied with an offer of such terms (2) as may be reasonable, under the particular circumstances; and if the first application is rejected, a second is sometimes made, and more favourable terms proposed (3). The *Attorney General* also, it should be remembered, has a power in certain cases to protect those who may have been guilty of an infringement of the revenue laws, without any dishonourable intention, by directing a nolle prosequi to be entered. The statute 26 Geo. 3. c. 77. provides that when a prosecution is commenced, or is depending, by an officer of either branch of the revenue, for the recovery of a fine, penalty, or forfeiture incurred under the regulations of the revenue, and it appears, to the satisfaction of the attorney-general, that there was no intention of fraud, he may prevent all further proceedings by entering a nolle prosequi on every such information, both with respect to the share to which the officer may claim to be entitled, and that belonging to his Majesty. (4)

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(1) The case of the ship Lucia Margaretha, 1 Price 42.

(2) But the order for restoration *may* be without any terms, if the Commissioners think fit. Case of the Maria, 1 Price, 4. supra. See forms of affidavit and petition, post, Appendix.

(3) See the case of the Lucia Margaretha, 1 Price 48.

(4) 26 Geo. 3. c. 77. s. 14. et seq.

Justices of the peace also, when a conviction takes place before them, have in general a power to mitigate the penalty; and when a party is convicted before two or more justices of the peace in a penalty incurred by an offence against a statute relating to the revenue of customs, and no power of mitigation is given by the act, or when a power is not specifically given by the act, but only by reference to some other law, the justices, in cases where, upon consideration of the circumstances, they shall deem it expedient so to do, are empowered to mitigate the penalty, provided the sum directed to be paid be not less than one half of the amount of the penalty in which the party has been convicted. (1)

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No prosecutions, either by action, bill, plaint, or information, for the recovery of fines, penalties, or forfeitures, incurred under the acts relating to the revenues of customs or excise, can be carried on, nor can any writs of appraisement for the condemnation of vessels or goods seized as forfeited under those acts, be issued except by order of the commissioners of customs or excise, or by or in the name of the attorney-general; and prosecutions or writs of appraisement, carried on or issued without the order of the commissioners, or without the sanction of the name of the attorney-general will be null and void; and the court or tribunal to which they are submitted, is not to allow any proceedings to take place upon them. (2)

Prosecutions must be by order of Commissioners, or in Name of Attorney General.

Justices of the peace may inquire into and determine prosecutions for penalties incurred by offences relating to the revenue of customs, either in the county where the offences were committed, or where the offenders are found (3); and they are authorized and required, upon an information being exhibited before them for the recovery of a penalty, to summon the party accused (4), and, upon his appearing or making default, to proceed to the examination of the matter of fact; and, upon due proof being made, either upon the voluntary confession of the party or upon the oath of one or more credible witness or witnesses, to convict the offender in the penalty; and in case of non-pay-

Proceedings before Justices for Offences against Laws of Customs; Limitation of Time; Service of Summons; committing for want of Distress.

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(1) 49 Geo. 3. c. 65. s. 4.

(2) 56 Geo. 3. c. 104. s. 15. See 26 Geo. 3. c. 77. s. 13. The King v. Steventon, 2 East, 362. 36 Geo. 3. c. 104. s. 38. 44 Geo. 3. c. 98. s. 10.

(3) Vide Talbot v. Hubble, 2 Stra. 1154.

(4) As to service of summons, 49 Geo. 3. c. 65. s. 3. infra, and 32 Geo. 3. c. 17. s. 1.

Proceedings before Justices, &c.

ment to cause the penalty to be levied by warrant of distress and sale under their hands and seals (1), upon the goods and chattels of the offender (2), and, in default of sufficient distress, to commit the offender to any of his Majesty's gaols in the county in which the offence arose, or in which the offender was found, to remain there for the space of six months, or until the penalty be paid (3). The statute 56 Geo. 3. c. 104. also empowered two or more justices of the peace to examine into and determine prosecutions for the condemnation of a seizure, made under the statutes relating to the revenue of customs, and magistrates are required, upon an information being exhibited before them for the condemnation of a seizure, to proceed upon it in the same manner and with the like powers and authorities as are given to them by the laws of the excise (4). But the information or proceeding for a fine, penalty, or forfeiture, incurred by an offence against the statutes relating to the revenue of customs, cannot be exhibited or instituted before a justice of the peace after the expiration of six months from the commission of the offence (5). In proceedings before a justice of the peace for a fine, penalty, or forfeiture, incurred under acts of parliament relating to the revenue of customs, the summons is not required to be personally served, but it may be left at the house or usual place of residence of the party, and directed to him, either by his right or his assumed name, and this method of service and direction will be sufficient in all cases, except where particular provisions are made for summoning offenders or for condemning seizures made from persons unknown (6). When an offender has been committed to gaol for want of distrainable property, and has remained there until the expiration of the period for which he has been committed, he will be wholly discharged from the penalty in respect of which the warrant was issued, in the same manner as if the full penalty had been paid immediately upon conviction. (7)

Protection and Liability of Revenue Offi-

The questions which most frequently arise in courts of justice with respect to the *protection and liability of the officers of the*

(1) As to sealing, Padfield v. Cabell, Willes Rep. 411. Bul. N. P. 83.

(2) See the former statutes 18 Geo. 2. c. 26. s. 13. 5 Geo. 3. c 43. s. 26.

(3) 49 Geo. 3. c. 65. s. 1. See 56 Geo. 3. c. 104. s. 14. Burn J tit. Excise and Cust. s. 1. and s. 3.; and see post as to excise.

(4) 56 Geo. 3. c. 104. s. 14.

(5) 49 Geo. 3. c. 65. s. 6.

(6) 49 Geo. 3. c. 65. s. 3.

(7) 49 Geo. 3. c. 65. s. 5.

cers with respect to Actions, Mandamus, &c.

revenue, are those which occur in civil prosecutions against them for seizing goods as forfeited. An officer of the revenue, who seizes goods under the authority of a legal warrant from a commissioner of excise or justice of the peace, is not liable to an action of trespass, nor indeed, in general, to any action whatever, although the warrant was grounded on the information of the officer himself, which afterwards proved to be unfounded; but if the officer obtained his warrant from malicious motives, and without any probable cause, he would be liable to a special action on the case (1). The warrant of the commissioners of excise, it seems, will not be sufficient to protect the officer if it is invalid in itself; and therefore, when a warrant was issued by the commissioners of excise for levying a penalty on the goods of a soapmaker for concealing soap, contrary to the statute 1 Geo. 1. st. 2. c. 36., which only authorized a levy on the particular goods which had not paid the duty; it was held, on an action being brought against the officer, that the warrant against the goods of the party generally was insufficient to justify a seizure of the property (2). An action is also maintainable against a revenue officer, when he acts without warrant, for seizing goods not seizable by law (3). A conviction before a magistrate having competent jurisdiction over the subject matter, is conclusive whilst it remains unreversed, so that the justice or propriety of it cannot be impeached in a collateral proceeding against the magistrate or the authorities by whom it has been executed (4). Where a conviction has been quashed

(1) Boot v. Cooper, 1 T. R. 535. 3 Esp. Rep. 135. S. C. decided on 10 Geo. 1. c. 10. s. 13. on warrant for seizing coffee, tea, &c. and overruling Bostock v. Saunders, 3 Wils. 434. 2 Bla. Rep. 912.; and see 6 Term. Rep. 315. 446.

(2) Austin v. Whitehead, 6 T.R. 436. it was held goods cannot be seized in hands of assignees for penalties incurred before the bankruptcy, id. ibid.; they may be seized for duties due before the bankruptcy, Stracey v. Hulse, Dougl. 411. See as to the protection of officer acting under warrant, 24 Geo 2. c. 44. s. 6.

(3) See the conclusiveness of a condemnation, ante, 785. Tinkler v. Poole, 5 Burr, 2657, which was an action of trover; but no costs, if probable cause of seizure, 28 G. 3. c. 37. s. 24. post, 610.

(4) Strickland v. Ward, 7 T. R. 633. Massey v. Johnson, 12 East, 74. note d. Gray v. Cookson. 16 East, 13. See Cripps v. Druden, Cowp. 640. 16 East, 21. 2. A record of condemnation in the exchequer, is conclusive evidence of the cause of forfeiture, on which it professes to be founded; but it has been questioned whether it is conclusive in an information against defendant for penalties, and it is not evidence of any other cause of forfeiture, nor of immaterial averments laid under a scilicet. Attorney General v. King, 5 Price, 195. Scott v. Shearman, 2 Bla. Rep. 979. and other MS. cases cited, 5 Price, 202, &c. ante, 785.

Protection and Liability of Revenue Officers, &c.

the (1) plaintiff, in an action against the justice, is not entitled to recover any more than the amount of the penalty levied upon him (2) and two-pence damages, without any costs of suit, unless he alleges and proves that the acts were done maliciously and without any reasonable and probable cause (3), and proceeds by action on the case (4); and the plaintiff will not be entitled to recover any penalty that has been levied, nor any damages or costs, if the justice should prove at the trial that the plaintiff was guilty of the offence of which he had been convicted, or on account of which he had been apprehended or had otherwise suffered, and that the punishment which he actually underwent, was not greater than that assigned by law to the particular offence (5). A recital in the warrant of commitment, that the conviction was grounded on the information of one person, when, in fact, the information was preferred by another, is not sufficient to render the magistrate amenable to an action (6). But the protection of the magistrate will not apply when the whole proceeding is coram non judice; and in a late case, when an action of trespass was brought against a magistrate who had isued his warrant to seize a gun, and the general issue was pleaded, it was holden necessary for the magistrate to show either by the conviction or by some other evidence that the gun was used for the purpose of destroying game (7). An action is also maintainable against an officer for neglecting to perform a ministerial duty enjoined by statute, as against the commissioners of customs for not making an order on the receiver general to pay the plaintiffs a premium of £700 on one of the 15 ships fitted and cleared out for the southern whale fishery, under the provisions of the statute 26 Geo. 3. c. 50. (8). It seems also that the court of king's bench will allow a writ of mandamus to be issued, to compel the commissioners of excise to grant a permit for the removal of wine, but on granting a rule nisi for the mandamus, the court will not make it a part of the order, that the proceedings to seize

(1) Massey v. Johnson, 12 East, 67. 71.

(2) Massey v. Johnson, 12 East. 79.

(3) Burley v. Bethune, 5 Taunt. 580.

(4) 43 Geo. 3. c. 141. s. 1.

(5) 43 Geo. 3. c. 141. s. 2.

(6) Massey v. Johnson, 12 East, 67.

(7) Leigh v. Torring, Serjeant's Inn, Hil. Term, 1806. Cripps v. Durden, Cowp. 640.; Gray v. Cookson, 16 East, 21, 2.

(8) Lacon v. Hooper, 6 T. R. 224. 26 Geo. 3. c. 50. s. 13. and s. 2 & 3. ante, 613.

the wines, as unentered stock in the hands of the dealer, shall be stayed in the mean time. (1)

Protection and Liability of Revenue Officers, &c.

Action removable into Court of Exchequer.

An action of trespass against a revenue officer for an act done in the execution of his duty, is removable from any of the other courts of law into the office of pleas of the court of exchequer (2). The proceeding for the removal of an action of this nature is a very ancient branch of the jurisdiction of the court of exchequer, and it operates after the manner of an injunction. The usual order is that the action be removed out of the king's bench or common pleas, or out of any other courts having jurisdiction, as the courts in London, the courts of Whitechapel, the Marshalsea courts, the courts of great sessions, and the county courts, for it has been used in all these instances; and in a late case, an order was granted for removing a writ of quare clausum fregit, and the proceeding thereon, in the court of great sessions for the county of Anglesea, on affidavits that the action was believed to be brought for a supposed trespass in entering a house to search for a person, against whom a capias had been issued by virtue of an information against him for concealing uncustomed goods (3). The order is to remove the action into the office of pleas of the court of exchequer, in which court it will be in the same forwardness as in that out of which the action is removed; the proceeding does not operate as a certiorari to remove the cause, but is a personal order on the party to prevent him from continuing the action in the court below, with liberty to commence it in the exchequer; and it appears to render it necessary for the defendant to appear to accept a declaration, and to put the plaintiff in the same state of forwardnes as he was in the other court (4). Formerly, indeed, it seems to have been thought that the officers of the revenue had a personal privilege to be sued in the court of exchequer (5). But this opinion is now exploded, and there does not appear to be any pleadable privilege; on the contrary, the court has always con-

(1) The King v. the Commissioners of Excise, 2 T.R. 381.; and see, as to the remedy by mandamus, The King v. Cookson. 16 East, 376. The King v. The Collector and Comptroller of Customs at Liverpool, 2 M. & S. 223.

(2) Anon. 1 Anstr. 205. Cawthorne v. Campbell, id. ibid. and cases there cited; and see 1 Manning's Exchequer Practice, 161 to 179, where the cases are collected.

(3) Ex parte Kingsman and others v. Officers of Customs, 1 Price, 206. 1 Anst. 207.

(4) Cawthorne v. Campbell, 1 Price, 201.

(5) By Perrot, Baron, 1 Anstruther, 216.

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fined the removal of suits of this nature to instances in which actions have been brought against revenue officers for acts done by them in the execution of their office (1). The court of exchequer has an inherent jurisdiction over all matters relating to the public revenue. But where the interposition of this authority is desired upon merely equitable grounds, and upon complicated facts, the proceeding must be by bill or information filed, and not by a motion or petition to the court. (2)

Persons concerned in the execution of the laws relating to the revenue, are especially *privileged* with respect to actions brought against them in several particulars.

Notice of Action and Tender of Amends.

1. No writ or other process can be sued out against an officer of the customs or excise (3), or " any person acting by his order in his aid, for any thing done in the execution or by reason of the acts relating to either branch of the revenue, until the expiration of one calendar month next *after notice in writing* has been delivered to him or left at his usual place of abode by the attorney or agent for the person who intends to sue; in which notice must be stated, clearly and explicitly, the cause of action, the name and place of abode of the person in whose name the action is intended to be brought, and the name and place of abode of the attorney or agent; and a fee of 20 shillings and no more, is to be paid for preparing and serving the notice (4). Officers of the army and navy, and other persons lawfully employed in the execution of the laws relating to the customs or excise, are entitled to the benefit of notice (5), and a person who received a yearly stipend from the board of excise, but had no regular appointment, and who was sent by an excise officer to make search in a boat on its coming to the shore, was held entitled to notice, although the officer was not present at the time (6). But a notice does not appear to be necessary when an action is brought for a mere non-feazance (7), as for retaining

(1) Cawthorne v. Campbell, 1 Anstr. 205.

(2) Ex parte Durrand, 3 Anstr. 743.

(3) Also extended to officers of the army and navy, and persons deputed by commissioners of treasury, &c. 56 Geo. 3. c. 104. &c. and ante 796, 7.

(4) 28 Geo. 3. c. 37. s. 25.

(5) Ante, 796, 7. & supra, n. (3).

(6) Clements and wife v. Keen, 2 Smith, Rep. 220. The action was brought for assault on plaintiff's wife. Plaintiff's counsel gave up the point, on defendant's waving the treble costs.

(7) Umphelly v. M'Lean, 1 Barn. & Ald. 42. Atkins v. Banwell, 3 East, 92. Blanchard v. Bramble, 3 M. & S. 131.

too large a sum for a fee out of the produce of property distrained; nor is a notice necessary when an action is brought against the officer for an act clearly foreign to his line of duty, as for taking money for the restoration of goods not liable to seizure (1); or for seizing goods by virtue of a warrant of a description obviously different from those mentioned in it (2). But the notice is necessary when an action is intended to be brought for an act of an official nature, although the particular act may not have been strictly within the line of the officer's duty, as when duties received by an officer are sought to be recovered back in an action for money had and received, on the ground that the statute which imposed them had been previously repealed (3). So a notice must be given previously to the commencement of an action for an assault, if committed by the officer in the supposed execution of his duty, upon a person whom he suspected to be employed in running goods, although the person assaulted afterwards turned out to be innocent (4). And when the officer fairly believes that he is acting in conformity to the powers conferred upon him, the protection afforded by the statute will apply (5). The requisites of the notice have been already adverted to. It should state the *cause* of action, but it need not specify the *form* (6); although if a particular form of action be stated, it should be adhered to in the subsequent proceedings (7). It should state the facts, but it need not contain the legal reasons or arguments upon which the action is grounded (8). It should contain the plaintiff's name and place of abode; and a notice of action against a custom-house officer for breaking the plaintiff's dwelling house at C. street in the parish of G. is insufficient without identifying the place stated as the place of the plaintiff's abode (9). The attorney or agent's name and place of abode should also be stated; but if the surname be stated, it is sufficient to state the initial letter of the christian name (10), and the attorney may

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(1) Irving v. Wilson, 4 T.R. 485.

(2) Price v. Messenger, 2 Bos. & Pul. 158. Seizure by constables on bumboat act, 2 Geo. 3. c. 28. s. 7.

(3) Irving v. Wilson, 4 T. R. 485.

(4) Daniel v. Wilson, 5 Term. Rep. 1. Clements v. Keen, 2 Smith, 220.

(5) Weller v. Toke, 9 East, 364. Graves v. Arnold, 3 Campb. 242. Gaby v. Wilts Canal Company, 3 M. & S. 580. Theobald v. Crichmore, 1 Barn. & Ald. 227. 1 Chitty's Rep. 317.

(6) Sabin v. De Bergh, 2 Campb. 196.

(7) Strickland v. Ward, 7 T. R. 635.

(8) The King v. The Justices of Devon, 1 M. & S. 412.

(9) Williams v. Burgess, 3 Taunt. 127.

(10) Mayhew v. Locke, 7 Taunt. 63.

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describe himself of the town in which he resides, as of Birmingham, without any further specification (1).

Tender of Amends.

2. The principal object of the notice of action is to enable the officer to *tender* amends, if any act has been done by him which is not strictly conformable to law. The statute 28 Geo. 3. c. 37. provides that an officer, or other person acting in his aid, to whom the notice has been given, may at at any time within one calendar month after the giving of the notice, tender amends to the person complaining, or his agent or attorney, and if the amends are not accepted, may plead the tender in bar to the action, together with the plea of not guilty, and any other plea, with leave of the court; and if upon issue being joined on the plea, the jury find that the amends tendered were sufficient, they will give a verdict for the defendant; and if such verdict be given, or if the plaintiff be nonsuited, or if he discontinue the action, or if judgment be given for the defendant upon demurrer, the defendant will be entitled to the costs which he would have been entitled to if he had pleaded only the general issue; and if the jury find that no amends were tendered, or that they were insufficient, and also find against the defendant on the other plea or pleas, they will give a verdict for the plaintiff, with such damages as they think proper (2). Even when an officer, or a person acting in his aid, has neglected to tender amends, or has tendered insufficient amends before action brought, it is still lawful for him, by leave of the court, at any time before issue joined, to pay money into court (3); and proceedings in an action for an unlawful seisure have been stayed on the terms of restoring the goods and paying costs. (4)

Limitation of Actions.

3. The statute 28 Geo. 3. c. 37. also provides that every action or suit for a thing done in pursuance of the acts relating to the customs or excise, shall be commenced within three months next after the matter or thing done (5). In computing the time, the day on which the act was done is to be included and reckoned as one (6). And the calculation is made by lunar

(1) Osborn v. Gough, 3 Bos. & Pul. 551; and see Taylor v. Fenwick, 3 Bos. & Pul. 553., and 6 Esp. 138. as to an indirect description.

(2) 28 Geo. 3. c. 37. s. 27.

(3) 28 Geo. 3. c. 37. s. 28.

(4) Pickering v. Trust. 7 Term Rep. 53.

(5) 28 Geo. 3. c. 37. s. 23. and see 23 Geo. 3. c. 70. s. 34. 24 Geo. 3. st. 2. c. 47. s. 35—39. and see the consolidation act, 59 Geo. 3. c. 52. s. 59. and 24 Geo. 3. sess. 2. c. 47. s. 39.

(6) Castle v. Burdett, 3 T. R. 623. Glassington v. Rawlins, 3 East, 407. Lester v. Garland, 15 Ves. J. 254. Watson v. Pears, 2 Campb. 294.

and not by calendar months (1). The action must be brought within three months from the time of the actual seizure, notwithstanding a suit has been instituted in the court of exchequer, which is depending at the expiration of the three months. (2). Protection and Liability of Revenue Officers, &c.

4. The *venue* also must be laid in the county in which the cause of action arose (3). And in an information by the attorney general on the excise laws, the venue cannot be charged without his consent. (4) Venue.

5. The defendant may plead the general issue, and give the special matter in *evidence* (5). In the year 1778, it was holden that on the plea of not guilty in an action of trespass, excise officers sued for acts committed in the execution of a body warrant issued by the commissioners of excise, might give the special matter in evidence. (6). General Issue.

6. With respect also to the *evidence*, the 23 Geo. 3. c. 70. s. 35. enacts, that if any goods liable to duties of excise or inland duties (7), are seized by virtue or in pursuance of any act of parliament; or if an action is brought by the owner or claimer of the goods against an officer of the excise or an officer for the inland duties, or any person acting in his assistance, for any thing done in pursuance of the acts, the burthen of proving the payment of the duty on the goods seized, shall lie upon the owner or claimer of the goods, and not upon the person by whom they were seized, or against whom the action is brought (8). Antecedently to this statute, it was enacted by the 12 Geo. 1. c. 28. that if any foreign goods should be seized for non-payment of duties or any other cause of forfeiture, and a dispute should arise whether the customs, excise, or inland duties had been paid for them, or whether the goods had been lawfully imported or legally compounded for or condemned, or concerning the place Evidence.

(1) Lacon v. Hooker, 6 T. R. 224. Lang v. Gale, 1 M. & S. 111.
(2) Godin v. Fenis, 1 Hen. Bla. 14. Saunders v. Saunders, 2 East, 254.
(3) 28 Geo. 3. c. 37. s. 23. and consolidation act, 59 G. 3. c. 52. s. 59. 9 Geo. 2. c. 35. s. 6. The King v. Cartwright, 4 T. R. 490. and 43 Geo. 3. c. 157. s. 2.
(4) Attorney General v. Smith, 2 Price, 113.
(5) 28 Geo. 3. c. 37. s. 23.
(6) Wood v. Chessal, 2 Bla. Rep. 1254. 12 Car. 2. c. 23. s. 35. 12 Car. 2. c. 24. s. 49. 10 & 11 W. 3. c. 21. 18 Geo. 2. c. 26. s. 13. 15. 5 Geo. 3. c. 43. s. 26. and see now, 28 Geo. 3. c. 37. s. 23.
(7) Distinction between excise duties and inland duties, R. v. Justices of Surry, 2 T. R. 510, 11.
(8) 23 Geo. 3. c. 70. s. 35.; and see 47 Geo. 3. sess. 2. c. 66. s. 34. 9 Geo. 2. c. 35. s. 13.

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from which the goods were brought, the proof should lie on the owner or claimant, and not on the person who should seize or stop them (1). But it seems that this statute being construed with reference to another, which it appears to have been intended to enlarge, was considered to extend only to prosecutions for condemnation in the court of exchequer, and not to actions of trespass against the officers (2). Officers of the revenue may be proved to be such on the trial of any indictment, information, action, or prosecution, by evidence of their being reputed to sustain that character, or of their having exercised the office, or of their having acted under such a commission or deputation on the occasion in respect of which the charge is made, this mode of proof being sufficient, unless evidence to the contrary be adduced (3).

Costs.

7. Persons employed in the execution of the laws of the revenue, have also another privilege with respect to *costs*. A person sued for any thing done in pursuance of the acts relating to the customs or excise, is entitled to *treble costs* on a verdict for the defendant, or a nonsuit or discontinuance, or a judgment against the plaintiff on demurrer (4). And when an information or other suit is brought to trial, grounded on the seizure of goods or the vessel, or horse or carriage employed in removing them, and a verdict is found for the claimant, and it appears that there was a probable cause of seizure, the judge, or court before whom the trial or hearing takes place, will certify that there was a probable cause for making the seizure; and the claimant will not be entitled to any costs of suit, nor will the person who made the seizure be liable to any action or indictment or other suit or prosecution on account of it (5). And if any action, indictment, or prosecution be commenced and brought to trial on account of the seizure of any goods, or of the vessel or carriage employed in removing them, (whether an information be brought to trial to condemn them or not), and a verdict be given *against* the defendant, if the court or judge should certify that there was

(1) 12 Geo. 1. c. 28. s. 9. 6 Geo. 1. c. 21. s. 41. The burthen, in such cases is now universally thrown by the legislature on the claimant.

(2) Salmon v. Gordon, 2 Bla. Rep. 813. Vide Shelley's Case, 1 Leach, 340, &c. and Rex v. Akers, 6 Esp. Rep. 125.

(3) 26 Geo. 3. c. 77. s. 12. Per Buller J., Berryman v. Wise, 4 T.R. 367. 3 Campb. 432. 6 Term Rep. 663. Statement of election of commissioners of customs or excise, under 45 G. 3. c. 121. s. 7. evidence of the fact, 47 Geo. 3. sess. 2. c. 66. s. 38.

(4) 28 Geo. 3. c. 37. s. 23.

(5) 28 Geo. 3. c. 37. s. 24.

probable cause for the seizure, the plaintiff will not be entitled to more than two-pence damages, besides the article seized or the value of it, nor to any costs of suit; and the defendant is not liable to be imprisoned, nor to be fined above one shilling (1). But a judge's certificate that a custom-house officer had probable cause for seizing goods, does not extend to other injuries which are stated in the declaration, and which accompanied the seizure, as entering a house, &c. and therefore will not prevent the plaintiff from recovering his damages and costs. (2)

Protection and Liability of Revenue Officers, &c.

Shooting and maiming Officers.

The officers employed in the collection of the revenue are also *protected* by numerous provisions in the *criminal* law, the severity of which is commensurate with the hardihood and audacity that are frequently displayed by persons engaged in the carrying on of contraband trade. Thus the hovering act, 24 Geo. 3. sess. 2. c. 47., provides that if any person upon the shore or on board of a ship shall maliciously shoot at any vessel belonging to his Majesty's navy, or in the service of the customs or excise, within the limits of a port, harbour, or creek of Great Britain, or within four leagues from the coast (3); or if a person when on shore, or on board a vessel, shall maliciously shoot at, maim, or dangerously wound any officer of the navy, or of the customs or excise, whether attempting to go on board, or being on board, or returning from on board, or otherwise acting in the due execution of his duty on shore, or within the limits of a port, harbour, or creek of Great Britain, or within four leagues of the coast (4); or shall maliciously shoot, maim, or wound any person aiding such officer in the execution of his duty, the person offending, and every person aiding or abetting in the offence, shall be adjuged guilty of felony, and suffer death as a felon, without benefit of clergy (5). However, the severity of several acts of parliament inflicting the penalty of death for crimes of this nature, is mitigated by the statute 52 Geo. 3. c. 143., which it is important to notice on account of its general effect in lessening the punishment of persons who are convicted of offences against the revenue. This statute enacts, that where an

(1) 28 Geo. 3. c. 37. s. 29. 23 Geo. 3. c. 70. s. 29. 26 Geo. 3. c. 40. s. 31.

(2) Baldwin v. Tankard, 1 Hen. Bla. 28.

(3) Extended to 100 leagues, by 47 Geo. 3. sess. 2. c. 66. s. 17.; and see 52 Geo. 3. c. 143. s. 11.

(4) Vide last note.

(5) 24 Geo. 3. c. 47. s. 11.; and see now 52 Geo. 3. c. 143. s. 11. Assaulting or obstructing officer, transportation for seven years, or three years imprisonment, by 45 Geo. 3. c. 121. s. 11.

Protection and Liability of Revenue Officers, &c.

from which the goods were brought, the proof should lie on the owner or claimant, and not on the person who should seize or stop them (1). But it seems that this statute being construed with reference to another, which it appears to have been intended to enlarge, was considered to extend only to prosecutions for condemnation in the court of exchequer, and not to actions of trespass against the officers (2). Officers of the revenue may be proved to be such on the trial of any indictment, information, action, or prosecution, by evidence of their being reputed to sustain that character, or of their having exercised the office, or of their having acted under such a commission or deputation on the occasion in respect of which the charge is made, this mode of proof being sufficient, unless evidence to the contrary be adduced (3).

Costs.

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Protection and Liability of Revenue Officers, &c.

offence is committed in breach of or in resistance to any part of the laws for the collecting of the revenue in Great Britain, which by the then existing enactments would subject the offender to suffer death as guilty of felony, without benefit of clergy, it shall hereafter be considered as a clergyable felony, unless the benefit of clergy is expressly taken away by the statute 52 Geo. 3. (1) Among other unclergyable felonies which are either introduced or retained by the statute 52 Geo. 3. c. 143. it is enacted by the eleventh section, that if any persons, to the number of three or more, armed with fire-arms or other offensive weapons (2), shall hereafter be assembled (3) within Great Britain, or within any of its ports or harbours, or within the Isle of Man, or any of its ports or harbours, in order to be aiding and assisting in the illegal exportation of wool or other goods prohibited to be exported, or in the carrying of wool or other such goods in order to such exportation, or in the illegal running, landing, or carrying away prohibited or uncustomed goods, or in the illegal relanding of goods, shipped or exported upon debenture or certificate, or in removing wool or other goods from the warehouse in which they have been deposited for securing the home consumption duties upon them, or in rescuing or taking away goods after seizure from an officer of the customs or excise, or other person employed in seizing them, or from the place where an officer has lodged them, or in rescuing a person apprehended for any of the offences made felony by an act relating to the revenues of customs or excise of Great Britain, or in preventing the apprehension of a person guilty of any such offence; or if any persons, to the number of three or more, shall hereafter be so aiding or assisting, either in Great Britain or within the limits of any of its ports or harbours, or in the Isle of Man, or if a person shall maliciously shoot at or upon any vessel belonging to the navy, or in the service of the customs or excise, within the limits of a port, harbour, or creek of Great Britain, or within the Isle of Man, or in any port of the British

(1) 52 Geo. 3. c. 143. s. 1. Forging customs or excise debentures or certificates for payment or return of money, is felony without clergy, s. 10.; so forging or imitating excise permits, &c. s. 9.; and see 45 Geo. 3. c. 121. s. 11. Felony to assault, or obstruct, or maliciously wound officer, &c. 45 Geo. 3. c. 121. s. 11.

(2) A common whip is not an offensive weapon within the act. Rex v. Fletcher, 1 Leach, Cro. Cas. 4 ed. 23.; and what is or not, Hutchinson's case, id. 339. and cases there cited.

(3) A casual assembly is not within this provision. The King v. Hutchinson. 1 Leach, 4 ed. 339.

or Irish channels, or on the high seas within 100 leagues of the coast of Great Britain, or if any person shall, either on shore or on the water, within these limits, maliciously shoot at, maim, or dangerously wound any officer of the army, navy, marines, militia, or volunteers, or any other of the military or naval forces, or any officer of the customs or excise, or any other person aiding such officer when acting in the due execution of his duty, under any of the acts relating to the revenues of the customs or excise of Great Britain, or of any act for the prevention of smuggling, the offender will be guilty of felony and suffer death as a felon, without benefit of clergy. Every offence committed in Guernsey, Jersey, Alderney, Sark, or Man is to be tried in those islands; an offence committed any where else out of the United Kingdom may be tried in any courts of the United Kingdom; and an offence committed in England, Scotland, or Ireland, may be tried in any county (1) within that part of the United Kingdom in which it arose (2). A particular mode is appointed by the act for taking the information by a justice of the peace, and subsequently certifying it to the secretaries of state, who are to lay it before the privy council, whereupon an order in council may be issued for the accused to surrender himself within a certain time, under the penalties attaching on a person attainted of felony without benefit of clergy (3). The statute 34 Geo. 3. c. 50. provides that if an officer of the navy, or of the customs or excise, either when on shore, or going on board, or being on board, or returning from on board a vessel, within the limits of any of the ports of this kingdom or within four leagues from the coast (4), shall be assaulted or obstructed in the due execution of his office or duty (5), either by

Protection and Liability of Revenue Officers, &c.

(1) 9 Geo. 2. c. 35. s. 26. The King v. Cartwright, 4 T.R. 490.

(2) 52 Geo. 3. c. 143. s. 11. The act extends to aiding and abetting; and see 19 Geo. 2. c. 31. which also contains (s. 6.) a mode of proceeding against the county for damages on officers being wounded, &c. post.; perpetual by 43 Geo. 3. c. 157.; and see as to arresting, &c. persons armed, &c. 19 Geo. 3. c. 69. s. 9.; and it is a misdemeanor, and the penalty or fine of £100, or imprisonment for one year, to make *signals*, &c. to smugglers, and a mode of prosecution is given by 47 Geo. 3. sess. 2. c. 66. s. 31. to 43.

(3) 52 Geo. 3. c. 143. s. 12. Vide 45 Geo. 3. c. 121. s. 11. 19 Geo. 2. c. 34. s. 10.; and see the proceedings in Harvey's case, Foster on Crown Law, 51. 1 Wils. Rep. 164. S. C. Bac. Abr. Smuggling, G. 4.

(4) Now 100 leagues, 45 Geo. 3. ante, 611.

(5) See as to these words, opinion of three judges. The King v. Brady, 1 Bos. & Pul. 189. 26 Geo. 3. c. 77. s. 12. Berryman v. Wise, 4 T. R. 366. Shelley's case, 1 Leach, 340. n. c. 6 Esp. Rep. 126. Rex v. Akers. 9 Geo. 2. c. 35. s. 13.

Protection and Liability of Revenue Officers, &c.

day or night, the offender and every person aiding him may be conveyed before one or more justices of the peace residing near to the place where the crime was perpetrated, who may commit the offender or offenders to the next county gaol, to remain there until the court of oyer and terminer, great sessions, or gaol delivery, or until a delivery by due course of law; and on an indictment being found, the defendant must plead without having the time to traverse usually allowed in a case of misdemeanor; and on a conviction taking place, he may be sentenced to hard labour on the river Thames, or other navigable river in England, for a term not exceeding three years (1), as is directed by the statute 19 Geo. 3. for the punishment of persons guilty of grand larceny, or else the court may order the offender to be committed to the common gaol or house of correction for a term not exceeding three years (2). The twelve judges were unanimously of opinion, on a prosecution by indictment upon the statute 24 Geo. 3. sess. 2. c. 47. s. 15., which the 34 Geo. 3. (3) was passed to explain and amend, that the expression on shore, as here used, is equivalent to on land, and that an officer of excise, seizing soap in the execution of his office, at an inland place at any distance from the sea, is within the scope and protection of the act (4). A person charged with assaulting or obstructing an officer of customs or excise in the due execution of his office, or a person acting in his aid, or with rescuing or attempting to rescue by force any uncustomed or prohibited goods, after a seizure of them by the officer, or with an offence against the laws of quarantine, is liable to be apprehended upon a judge's warrant, on the fact being disclosed to a judge of the court of King's Bench, and supported by affidavit, or by certificate of an indictment or information being filed in that court, when he is to be brought before a judge of the King's Bench, or one of his Majesty's justices of the peace, in order that he may be bound to the crown, with *two sufficient sureties*, in such sum as shall be expressed in the warrant for his appearing in court at the time mentioned in the warrant, and answering all

(1) And see further 45 Geo. 3. c. 121. s. 11.

(2) 34 Geo. 3. c. 50. s. 5., passed to explain 24 Geo. 3. sess. 2. c. 47. s. 15.; and see 45 Geo. 3. c. 121. s. 11. As to felonious assaulting, &c. 52 Geo. 3. c. 143. s. 1.; and see the £200 penalty on assaulting officers, by 57 Geo. 3. c. 87. s. 9.; and £40, 8 Geo. 1. c. 18. s. 25. Where several obstruct, each is liable to a separate penalty. Rex v. Clark, Cowp. 610. The King v. Hube and others, 5 T. R. 542.

(3) 34 Geo. 3. c. 50. s. 5.

(4) The King v. Brady and others, 1 Bos. & Pul. 187.

indictments or informations for offences of this nature; and if the person accused should neglect or refuse to become bound, he may be committed to the common gaol of the place where the offence has been committed, or where the offender was apprehended, until he shall have become bound, or until he shall be discharged by an order of the court of King's Bench in term time, or by one of the judges in vacation, and the recognizances taken thereupon are to be returned and filed in court, and continue in force until an acquittal takes place, or until judgment has been given after conviction, unless the court order that they should be sooner discharged (1). A method is also prescribed by the statute 19 Geo. 2. c. 34. the provisions of which with regard to this subject are made perpetual by the statute 43 Geo. 3. c. 157. for remunerating persons employed in the execution of the laws of the revenue, if they should happen to be beaten, wounded, maimed, (or their executors, if they should be killed in the discharge of their duty,) by allowing them to recover to a certain amount for the damages they may sustain by the loss of goods, or by violence that is offered to their persons, besides the sum of £100 to be recovered by the executors of any person killed against the inhabitants of a hundred, rape, or lathe, in which the fact took place (2). An action of debt is maintainable upon the statute for the £100 penalty against the inhabitants of a lathe in Kent, by the executor of a revenue officer, who when in a boat between high and low water mark, in pursuit of a smuggling boat in which there were offenders against the act, received a mortal wound by a shot fired by a person on the shore within the lathe, though the officer afterwards died on the high sea beyond the low water mark, and consequently out of the lathe (3). The 19 Geo. 2. refers to and adopts the statute of hue and cry, 8 Geo. 2. c. 16., with respect to the mode of proceeding, but it is questionable how far that statute can apply to the mode of levying the money recovered, which is directed to be raised by two justices of the peace of the county, riding, or division, when the fact happened within the jurisdiction of

Protection and Liability of Revenue Officers, &c.

Officers suing the Hundred.

(1) 26 Geo. 3. c. 77. s. 18. General issue, local venue, three months limitation, and treble costs, by s. 20.

(2) 19 Geo. 2. c. 34. s. 6. not more than £40 for the beating, and £200 for the loss of the goods; mode of proceeding is detailed, s. 6, 7. No satisfaction if offender convicted in six months, s. 8.; and all actions against hundred must be within a year, s. 9.; perpetual by 43 Geo. 3. c. 157.

(3) Grosvenor, executor, &c. v. Inhabitants of Lath of St. Augustine in Kent. 12 East, 244. 13 East, 544.

Protection and Liability of Revenue Officers, &c.

the cinque ports, in which there is an exclusive commission of the peace (1). However, in following up the writ of execution to its consummation it is sufficient for the sheriff, to whom the writ has been delivered, to return, even after the expiration of the sixty days given him by the act to return the writ, that he has delivered it to the justices of the peace of the hundred, &c., (who are charged with the duty of directing the levy on the inhabitants), and that they had done nothing upon it; and the court will not thereupon attach the sheriff for not returning the writ, but the next proceeding was against the magistrates, to oblige them to perform their duty. (2)

II. Excise Duties, History of them, &c.

The duties of *Excise*, it has been already observed, are inland imposts in contradistinction to the customs, which are for the most part levied on articles employed in foreign trade (3). The origin of the excise duties is traced to the reign of Charles the first; they were afterwards adopted in the time of the protectorate, and soon after the restoration, two statutes were passed by which they were confirmed to the crown; the statute 12 Car. 2. c. 23. which granted an excise on certain commodities for the king's life, and the other statute (c. 24.) of the same reign, which, in lieu of the military tenures, granted to the crown an hereditary excise on certain other commodities (4). A *consolidation of the excise duties* has been recently effected by the 43 Geo. 3. c. 69., which provided that after the 5th of July 1803, all the duties, allowances, bounties, and drawbacks of excise, and other duties under the management of the commissioners of excise in England and Scotland respectively, granted by any act of parliament then in force, should cease; and the duties to be afterwards paid in respect of the goods mentioned in the act were set forth in tables, together with the allowances, bounties, and drawbacks. The special allow-

Existing Duties.

(1) Grosvenor v. the Inhabitants of lathe of St. Augustine. 12 East, 244.

(2) Wright and another v. lathe of St. Augustine. 13 East, 544. And see the rewards and compensations to officers by commissioners of customs and excise, 24 Geo. 3. sess. 2. c. 47. s. 21, 22. Rewards by commissioners to informers, 56 Geo. 3. c. 104. s. 7.

(3) See ante, 690.

(4) Wood v. Chessal, 2. Bla. Rep. 1255; as to the excise duties in general, see Sinclair on Rev. Index, tit. Excise; Postlethwaite, tit. Excise; Montefiore, same title; and Highmore's excellent treatise on Excise, per tot.

ances directed by acts of parliament in force on 5th July 1803, being also continued, except so far as they were expressly altered or repealed by the act (1): but this statute did not repeal the duties upon malt, mum, cider, and perry, granted by the 43 Geo. 3. c. 3.; nor the duties on malt, tobacco, and snuff, continued by 43 Geo. 3. c. 4.; except with respect to the duties imposed by that act on tobacco of the growth, production, and manufacture of the plantations or dominions of Spain and Portugal, delivered for exportation; nor did the 43 Geo. 3. c. 69. repeal or alter the countervailing duties of excise upon the importation of goods into Great Britain from Ireland (2), or the drawbacks payable on goods exported from Great Britain to Ireland, except the countervailing duties and drawbacks for beer, ale, and mum, bricks and tiles, cider and perry, hops, mead, or metheglin, spirits, vellum and parchment, gilt and silver wire, and gold and silver thread lace or fringe (3). Since the passing of the stat. 43 Geo. 3. c. 69., the excise duties have been increased by different acts of parliament (4); but the course which we shall adopt in considering this subject does not render it necessary to notice the amount of duty with which different articles are charged. (4) The collection of the duties on tobacco, snuff, coffee and cocoa-nuts, tea and pepper, is now wholly transferred to the excise. (5) The statute 59 Geo. 3. c. 53. was passed to impose additional duties of excise on tea, coffee, and cocoa-nuts, tobacco and snuff, pepper, malt, and British spirits, and to consolidate them with the former duties; and the laws of excise relating to these articles are in some respects amended by the same statute. The statute 59 Geo. 3. c. 53., contemplating that agreements may have been made antecedently to that statute for the sale or delivery of particular articles, without reference to the additional duties, provides, that the contractors shall be considered as having authority to add a sum equivalent to the amount of duty, to the price of any particular article. (6) The statute of the year of 43 Geo. 3., which received the royal assent on the 5th of July in that year (7), contained a similar provision; and in the construction

II. The Excise Duties.

(1) 43 Geo. 3. c. 69. s. 2.

(2) Granted by 39 & 40 Geo. 3. c. 67.

(3) 43 Geo. 3. c. 69. s. 1.

(4) Vide 55 Geo. 3. c. 30. until 5th April 1819, and see infra as to particular articles.

(5) Customs Cons. Act, 59 Geo. 3. c. 52. Table A.

(6) 59 Geo. 3. c. 53. s. 13. 2d July 1819.

(7) 43 Geo. 3. c. 81. 5th July 1803, in force until 12 months after peace.

II. The Excise Duties.

of this clause it was determined, that a vender of spirits, which were contracted for on the 21st of May, but were not shipped till after the 5th of July 1803, was entitled to charge the purchaser with the duty imposed by the 43 Geo. 3., no delivery, either actual or virtual, having taken place before the 5th of July; for the purchaser, whose duty it was to provide a vessel, had not provided one before that time; and the quantity of spirits which the purchaser was to have, had not been set apart for him in the vendor's warehouse. (1)

Division of the Subject.

The consideration of the duties of excise, and of the regulations connected with them, will be most conveniently arranged in the following order; namely, *First, the provisions connected with particular articles,* as, 1. Auctions. 2. Beer. 3. Bricks. 4. Candles. 5. Glass. 6. Hops. 7. Leather. 8. Linen, cotton, &c. 9. Malt. 10. Plate. 11. Soap. *Secondly, those provisions of a general nature* that relate to licenses, permits, &c ; entries at the excise office ; the dealer's books, and documents of this description, being principally adopted for the purpose of securing the duties of excise. *And thirdly, the mode of recovering the duties, and the penalties and forfeitures incurred by the non-payment of them.* The laws connected with excise are so voluminous, that it would not be possible to embrace them all within the limits to which this branch of the subject is necessarily confined in the present treatise. In considering them, it is proposed to notice the most important provisions; selecting more especially those which have been made the subject of judicial exposition and illustration.

First, the Provisions and Decisions connected with particular Articles.
The Auction Duty.

The *auction* duty is regulated with respect to its amount by the stat. 43 Geo. 3. c. 69. and 45 Geo. 3. c. 30. which relate to interests in landed (2) and in personal property (3), and by stat. 55 Geo. 3. c. 142., which regulates sales by auction for the benefit of growers of sheep's wool (4). A bond given by the parish of Saint Mary le Bone, under the local acts of parliament 35 Geo. 3. c. 73. and 53 Geo. 3. c. 163. for securing to the holder the payment of £100 on the parish rates, is comprehended in

(1) Haig v. Napier, 1 Dow. Rep. 255. App. from Co. of Sess.

(2) Seven-pence for 20s. of purchase money. The King v. Bates, 3 Price, 341, infr. Property in the funds and some other interests included.

(3) One shilling for 20s. of purchase money. The King v. Bates, 3 Price, 345.

(4) Two-pence, 55 Geo. 3. c. 142. which recites former acts.

the first description; a bond of this nature not being a mere chattel, but a charge on the property in respect of which the rates are assessed; and therefore it is subject to duty as upon the sale of an interest in landed property (1). But if the owner of property put up to sale by auction should become the purchaser by means of his own bidding, or the bidding of any other person on his behalf or for his use, without fraud or collusion, the officers in the management of the excise are empowered to make an *allowance* to him of the duties to which the bidding would otherwise give rise. Formerly, notice in writing of a person being appointed to bid must in such a case have been given, signed by the owner and person appointed to be the bidder, and the delivery of the notice and the general fairness of the transaction must have been verified upon the oath of the auctioneer, to the best of his knowledge and belief (2). However, a recent statute provides, that the allowance of auction duty shall be made to the owner, on any property in respect of which the auction duties have not been paid, and which have been put up to auction and bought in for the owner, either by the steward and known agent of the owner, actually employed in the management of the sale, or under a notice in writing, signed by the steward or agent, and by the person intended to be the bidder, of the latter being appointed by the former, and having agreed to bid for the behoof of the seller. But no such allowance will be made for property bought in for the owner by a steward or an agent, unless notice in writing under his signature, of his being about to bid for the owner, has been given to the auctioneer before the bidding; and no allowance will be made for property bought in for the owner under a notice signed by the steward or agent, and by the person intended to be the bidder, unless the notice has been given to the auctioneer before the bidding; and the delivery of the notice must in both cases be verified upon the oath of the auctioneer, as well as the fairness and reality of the transaction, to the best of his knowledge and belief (3). No allowance of the auction duty will be made on account of property having been bought in for the owner under a written notice, unless the notice is produced by the auctioneer at the time appointed by law for his passing his account of the sale to the proper collector or other officer of excise

II. The Excise Duties.

(1) The King v. Bates, 3 Price, 341. As to the nature of this property, see Finch v. Squire, 10 Ves. 41.

(2) 19 Geo. 3. c. 56. s. 12.

(3) 42 Geo. 3. c. 93. s. 1.

II. The Excise Duties.

authorized to pass the account of the sale; and the notice must be left with the collector or other officer. And if a dispute should arise whether the purchase by or for the owner was not made by collusion, or in order to lessen the full sum payable for duty, or concerning the fairness of the transaction, the proof will lie upon the person acting as auctioneer; and no allowance is to be made if any unfair practice take place (1). The court of king's bench has determined, that if the agent of the owner of an estate puts up property to auction at a certain price, and then withdraws it on finding that there is no bidder, no sale takes place within the meaning of the statutes imposing the duty; nor any bidding on the part of the owner, so as to render it necessary that there should be a notice in writing (2). But notwithstanding this case, it has been doubted whether, under such circumstances, the mention of an upset price as it is termed, and then withdrawing the property from sale, does not make the vendor a buyer in of the property, although there is not another bidder (3). Where property was put up at a certain price, and the agent who attended at the sale, finding that no bidder presented himself, stated to the persons assembled, that he was ready to treat for the disposal of the estate by private contract, and went into a private room with several of the company, and several offers being made, he engaged that the highest should be accepted, which was accepted accordingly; it was determined that a sale by auction had taken place within the meaning of the statute (4). The *exemptions* from the general operation of the auction duties are introduced by the statutes 17 Geo. 3. c. 50. s. 12. 42 Geo. 3. c. 93. s. 3. 47 Geo. 3. sess. 2. c. 65. 52 Geo. 3. c. 53. s. 1. 28 Geo. 3. c. 37. s. 12. 30 Geo. 3. c. 26. s. 1. 30 Geo. 3. c. 29. s. 2. 32 Geo. 3. c. 41. 41 Geo. 3. c. 42. which relate principally to plantation produce on its first sale after importation; the stat. 32 Geo. 3. c. 41. & 41 Geo. 3. c. 42. relating also to whale oil, and the produce of the fisheries; by stat. 29 Geo. 3. c. 63. s. 1, 2. which relates to goods woven in

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(1) 42 Geo. 3. c. 93. s. 2. 28 Geo. 3. c. 37. s. 20. 19 Geo. 3. c. 56. s. 12. 17 Geo. 3. c. 50. s. 10.

(2) Cruso v. Crisp, 3 East. 337, decided on 19 G. 3. c. 56. s. 12.; the 42 G. 3. c. 93. was not adverted to.

(3) Walker's case, 1 Dow. Rep. 111. Where a female auctioneer sold an estate, and was silent all the time, but rewarded each bidder with a glass of brandy, and the person who had the last glass had the property, this was held a sale by auction.—Id. ibid.

(4) Walker's case, 1 Dow. Rep. 111.

Great Britain; by the stat. 41 G. 3. c. 91. s. 8. which relates to provisions on the first sale after importation; by the stat. 19 Geo. 3. c. 56. which exempts property sold by auction under decrees of the courts of chancery or exchequer, or great sessions, property sold by the East India company or Hudson's Bay company, or by order of the commissioners of customs or excise, board of ordnance, or commissioners of navy or victualling offices, goods distrained for non-payment of rent or tithes, property sold by auction for the benefit of creditors, or by the order of assignees under a commission of bankruptcy (1); and there are some other exceptions (2). A sale made by the assignees of a bankrupt, of property in which the bankrupt had a fee simple estate, but which was mortgaged for a term of one thousand years, has been holden not to be within the exemption, the assignees having assumed to dispose of the absolute property in the estate without any exception of the mortgaged term; and on a scire facias being brought against the auctioneer on his bond for not accounting, the court of exchequer refused to deduct the proportional part of the duty payable on the value of the equity of redemption from the duty payable to the crown (3). Among other exceptions introduced by the statute 19 Geo. 3. c. 56. it is declared, that the act shall not extend to an auction held for the letting or demising of messuages, lands, or tenements, for the term of a life or lives, or any number of years to be created by the person on whose account the auction is held: and tithes are comprehended in the word tenement (4). A letting by auction of tithes of corn then standing and growing on the ground, to be transferred by way of lease for one year, to commence from a day past, is a letting by auction within the meaning of the statute, and not a sale of the tithe, even although no actual lease should be afterwards made. (5)

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Auctioneer's Licence and Bond, &c.

The duties are a charge upon the auctioneer immediately upon the knocking down of the hammer (6). He may recover them or retain them against his employer (7). But where the duty attaches on account of his not having taken the

(1) 19 Geo. 3. c. 56. s. 13., and see other exceptions, id. s. 14, 15, and post as to lease of tithes.

(2) See 54 Geo. 3. c. 137. s. 74. 55 Geo. 3. c. 55. s. 12. 19 Geo. 3. c. 56, s. 14, 15. and infra as to letting tithes.

(3) The King v Abbott, 3 Price, 178.

(4) The King v. Ellis, 3 Price, 323.

(5) Id. ibid.

(6) 19 Geo. 3. c. 56. s. 6.

(7) 19 Geo. 3. c. 56. s. 7.

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due precautions, he cannot recover it back (1). A person sustaining this character must also take out a licence (2), and give a bond with sureties to the crown for the performance of his duty (3). On the construction of this bond it was holden in the court of exchequer, that if the bond is broken, the whole penalty is due; and that court has refused, after judgment by default, to stay proceedings on the payment of principal and interest due upon it, and of the costs, on an affidavit that from the multiplicity of business of the auctioneer, it was impossible for him to have all the accounts and vouchers ready to be produced at the day, and which he had since made; for it is said, the revenue is periodical, to satisfy a periodical expenditure, it being for the most part appropriated to services within the year; and therefore a payment after the day, even with interest, can never amount to a compensation in cases of this nature (4). And a notice and catalogue and declaration of the sale must also be given by the auctioneer to the officers of excise. (5)

Beer.

The excise duties imposed on beer by the statute 43 Geo. 3. c. 69. have been increased and varied by the stat. 55 Geo. 3. c. 30. (6); and there are also several acts of parliament to protect this article from the admixture of unlawful and injurious ingredients; as the 1 W. & M. sess. 1. c. 24. s. 17. 10 & 11 W. 3. c. 21. s. 34. 9 Ann. c. 12. s. 24. 12 Ann. sess. 1. c. 2. s. 32. 42 Geo. 3. c. 38. s. 20. to 25. 56 Geo. 3. c. 58. s. 2. (7) The provisions that have been made by the legislature to preserve the purity of beer are liberally construed in our courts of justice in advancement of the objects for which they were enacted.

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(1) Capp v. Topham, 6 East, 392.

(2) 12s. duty by 43 Geo. 3. c. 69. and 55 Geo. 3. c. 30., until 5th April 1819; and see as to the licence in general, 19 Geo. 3. c. 56. s. 3.; and 31 Geo. 2. c. 32. s. 6. as to selling places, 26 Geo. 3. c. 59. s. 10. as to sales by commissioners of excise. One act of selling exposes person to penalty if no license taken out. Paley Conv. 71. Boscawen, 130.

(3) 43 Geo. 3. c. 130. s. 1. 42 Geo. 3. c. 93. s. 14. 19 Geo. 3. c. 56. s. 7. 38 Geo. 3. c. 54. s. 2. & 29 G. 3. c. 63. s. 3 & 4.

(4) Rex v. Christie, 2 Anstr. 586. decided on 19 Geo. 3. c. 56. s. 7. See the statutes referred to in the last note; and see as to auctions in general, Burn J. 2 vol. tit. Excise, sect. 5 (2), p. 79 to 86. 2 Highmore, 40 to 52. Huie, 37 to 46.

(5) 19 Geo. 3. c. 56. s. 9, 10. 16, 17. and 32 Geo. 3. c. 11. Huie, 44.

(6) And see 56 Geo. 3. c. 113. as to beer license; and 48 Geo. 3. c. 143. Huie on Excise, 47 to 70. Burn J. Excise, 5 (1). Utensils liable to penalties and duties, 15 Car. 2. c. 11. s. 13. 28 Geo. 3. c. 37. s. 21.

(7) And see as to the sophistication of hops, post, 827.

When a druggist, after the passing of the stat. 42 Geo. 3. c. 38., sold a quantity of drugs, consisting of Spanish juice, isinglass, ginger, and other articles, to a brewer, knowing they were to be used in a brewery, it was holden that he could not recover the price (1); and a remedy is also now provided for this particular case by the stat. 51 Geo. 3. c. 87. s. 17. The 51 Geo. 3. also provides, that brewers shall not receive or take into their possession certain ingredients, as grains of paradise, &c. (2); these articles having been found to be frequently employed to an unlawful purpose: and it is no defence to a person charged with an offence against this statute, that he also exercised the trade of a distiller at a place distinct from his brewery, and that the noxious ingredients were found at that place. (3) But an information on such a statute, charging a receiving and taking into possession, has been holden not to be maintainable, where it is proved that the act of receiving was antecedent to the statute, although the possession has continued ever since (4). A record of condemnation in the court of exchequer appears to be conclusive evidence against the defendant in an action for the penalty; but it is not evidence of immaterial averments, which are stated in it under a scilicet; and a condemnation for an act of forfeiture created by one statute, is not evidence on a charge of an offence against the same party, with respect to the same goods, created by another statute. (5)

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Bricks made for sale are required by the stat. 17 Geo. 3. c. 42., partly for the security of the revenue, and partly for the protection of the buyer, to be made of certain dimensions. And, therefore, where a vendor sold and delivered bricks under the statutable size, it was holden, that he could not receive the price, although the buyer had received and used them. (7)

Bricks.

(1) Langton v. Hughes, 1 M. & S. 593.

(2) 51 Geo. 3. c. 87. s. 16. Penalty £200, and forfeiture of goods.

(3) Attorney General v. King and others, 5 Price, 195.

(4) Attorney General v. King and others, 5 Price, 195.

(5) Attorney General v. King, 5 Price, 195.; and see as to the duties on ale, beer, cider, perry, mum, metheglin, and mead, Burn J. 2 vol. tit. Excise, sect. 5 (1), 64 to 79. 2 Highmore, ale and beer, 1 to 39; cider and perry, 101 to 109; mum, metheglin, and mead, 235, 6. Huie, beer and ale, 47 to 70; cider and perry, 156 to 164; metheglin and mead, 298 to 301.

(6) See as to bricks and tiles, Hine, 70 to 75.

(7) Law v. Hodgson, 11 East, 300. Langton v. Hughes 1 M. & S. 596, per Lord Ellenborough. And see as to bricks and tiles, Burn J. 2 vol. tit. Excise, sect. 5 (3), 86 to 88. 2 Highmore, 53 to 65. Huie, 70 to 75; and as to cambricks and lawns, 76 to 79.

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Candles.

The excise duties payable on *candles* vary in amount according to the different manufacture of the article (1). The maker of the candles is liable to the forfeiture of treble value, which attaches under the stat. 26 Geo. 3. c. 77. s. 10. upon all persons who knowingly receive, buy, or have in possession, candles after they have been removed from the place where they were made, and where they ought to have been charged with duty, before the duty is charged, or before the candles have been condemned, whether they do or do not claim any property in them (2). And, therefore, where a maker of candles removed them from his manufactory at Edmonton, to a shop in London, before the duty had been paid, he was holden liable to penalties under the act (3). The meaning of the clause is, that the candles shall be impounded until the duty is charged, and any person who removes them is liable to forfeit treble value. A change of place is prohibited, and not change of property. On a prosecution by indictment in the court of king's bench, against several defendants, for conspiring to dissuade a witness from attending before the commissioners of excise, to give evidence in support of an information for removing candles in respect of which no duty had been paid, and no condemnation had taken place, several points were determined with regard to the information, which it is material to notice. First, the court determined that the clause of the statute 26 Geo. 3. c. 77. which enacts, that no prosecution shall be carried on in the king's courts, for the recovery of an excise penalty, unless prosecuted by the attorney general or some revenue officer, was confined to the superior courts of record; and therefore, an information for a penalty for removing wax candles from the place of manufactory before the duty paid, might be prosecuted before the commissioners of excise, by a person not stated to be an officer (4). And it seemed also to be the opinion of the court, that an information, stating in effect that the candles were home-made, would be sufficient without expressly describing them as British candles; the words of the act being "British spirits, soap, and candles;" although an informality of this nature,

(1) See as to candles, Huie, 80 to 94.

(2) 26 Geo. 3. c. 77. s. 10, 11. spirits, soap, and candles. Attorney General v. Forge, Forrest, 105.

(3) Id. ibid.; and see as to candles, Burn J. 2 vol. tit. Excise, sect. 5 (4), 89 to 98. 2 Highmore, 66 to 97. Huie, 80 to 94. And as to coffee, tea, cocoa-nuts, and chocolate, Burn J. 2 vol. tit. Excise, sect. 5 (5), 99 to 121. Huie, 94 to 128.

(4) The King v. Steventon and others, 2 East, 362. See now 56 Geo. 3. c. 104. s. 15. ante, 801.

however available it might have been as a ground of error or of appeal in the original information, would not constitute a sufficient ground of objection in a collateral prosecution for conspiring to prevent the examination of a witness before the commissioners of excise (1). The information for removing the candles is correct in stating, that no condemnation had taken place, and that the duty had not been paid before the removal of the goods (2). And it is not material on the collateral prosecution for a conspiracy to state the issuing of process, or the joinder of issue on the information, before the commissioners (3). Nor is it necessary to recite, that the original information was prosecuted before the commissioners by name, although it is not averred to have taken place before three or more of them, according to the stat. 1 Geo. 2. st. 2. c. 16. (4). And in stating the information, it is sufficient to allege, that it was preferred within three months after the commission of the offence, according to the stat. 1 W. & M. c. 54. s. 13., without also stating, that notice was given to the defendant within a week, as directed by the same statute (5). The statute 7 & 8 W. 3. c. 30. enabling the commissioners of excise to summon witnesses before them, on a charge being exhibited for an offence of which they take cognizance, it was held sufficient to prove a printed summons distributed and issued in blank by the order of the commissioners to their agents, and afterwards filled up without any special directions from the board, although not signed by any of the commissioners, nor issued in their individual names. (6)

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Glass.

The manufacture of *glass* is also regulated in its different stages by several statutes, which are framed to secure the excise duties upon this article (7). The duty imposed by the statute 27 Geo. 3. c. 28. s. 5. upon plate glass squared into plates of a certain superficies, was holden to attach upon rectangular figures, the word square not being confined to its strict accep-

(1) The King v. Steventon and others, 2 East, 362. The word British does not apply to candles, but to spirits, though the act seems to assume that they should be home-made, 2 East, 371. 373.

(2) The King v. Steventon, 2 East, 362.

(3) The King v. Steventon and others, 2 East, 362.

(4) The King v. Steventon and others, 2 East 362.

(5) The King v. Steventon and others, 2 East, 362.

(6) It appeared that this was the constant practice at the excise office. The King v. Steventon, 2 East, 362.

(7) See Huie, 175 to 216.

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tation as equilateral (1). A court of justice will not allow evidence to be admitted of the technical meaning of the word in the trade, in order to explain the statute. The judge is to direct the jury as to the point of law, and in doing so, must form his judgment of the meaning of the legislature in the same manner as if it had come before him by demurrer, where no evidence could be admitted. Yet on demurrer a judge will frequently inform himself from dictionaries or books on the particular subject concerning the meaning of any word; and if he does so at Nisi Prius, and shews them to the jury, it will not be considered that he has admitted them as evidence, but only as the grounds on which the judge has formed his opinion, as if he were to cite authorities upon a point of law (2). The statute 17 Geo. 3. c. 39. directs that every maker of glass shall, in the notice to be given by him express in writing the particular time and hour at which he intends to begin to fill or charge his pot or pots, and the account of the true weight of the metal or preparation to be made use of in each particular pot used for the making of glass, and the species and particular kind of glass intended to be made in each pot; and that if any maker of glass shall neglect or refuse to give the notice required, or after such notice given, and a gauge taken by the officer, of the preparation in their pots, shall, without a fresh notice in writing put into the pot any metal or preparation whatever, such maker shall in every case forfeit the sum of fifty pounds (3). This provision recites, that some makers of glass, in giving notice under the act, had neglected to specify the true weight of the metal or preparation put into each pot used for the making of glass, and had also put in materials into the pots after a gauge of the metal had been taken by the officer, under pretence that the same were moyles of glass of the present or some former making, by which means the revenue was greatly defrauded (4). And it has been decided, that breaking in the moyles of glass bottles into the pot, is a putting in of fresh materials within the meaning of the statute (5). The court of exchequer will not grant an order that a view may be taken of the lear of a glass-house on an information against the proprietors of the manufactory for duties, where the question may be tried by the production of a

(1) Attorney General v. The Cast Plate Glass Company, 1 Anstr. 39.

(2) The Attorney General v. The Cast Plate Glass Company, 1 Anstr. 39.

(3) 17 Geo. 3. c. 39. s. 33.

(4) 17 Geo. 3. c. 39. s. 33.

(5) The Attorney General v Parke, 1 Anstr. 240.

model (1). An information has been filed in that court for sending out to common brewers stale beer, beer grounds, and sugar water; the court in the first instance granted a rule nisi for a view, but it was afterwards discharged on showing cause, and the question tried by the production of a model (2). II. The Excise Duties.

The duties on *hops* are fixed by the stats. 43 Geo. 3. c. 69. 45 Geo. 3. c. 94. 46 Geo. 3. c. 138. and 45 Geo. 3. c. 99. (3) The statute 7 Geo. 2. c. 19. s. 2. in order to preserve the purity of the commodity, enacts, that if any person shall put any drug or ingredient whatever into hops to alter the colour or scent thereof, every person so offending, convicted by the oath of one witness before one justice of the peace for the county or place where the offence was committed, shall forfeit £5 for every hundred weight (4). And it is an offence within this statute to mix the vapour of sulphur and brimstone with the hops (5). By the ascending of the vapour the particles of brimstone become mixed with the hops; and no ingredient can be lawfully mixed, although it may tend to the improvement of the commodity, if it would sophisticate or adulterate its quality so as to alter the colour or the scent (6). Hops,

The statute 48 Geo. 3. c. 60., which repealed the 1 Jac. 1. c. 22., enacts, that no person using the trade of tanning of *leather*, shall, either by himself or by any other person, during the time he shall carry on the trade of tanning, exercise or carry on the trade of a shoemaker, currier, leather-cutter, or other artificer exercising the cutting or working of leather, upon pain of forfeiting every such hide and skin so by him wrought or tanned, or the value thereof, to any person who will sue for the same in any of the courts of record at Westminster; one moiety of which forfeiture shall be to the king, and the other to the person who shall sue for the same. (7) A tanner, selling hides by retail, was holden not to be an artificer within the meaning Leather.

(1) Attorney General v. Green, 1 Price, 130.

(2) Attorney General v. Mathew, 1 Price, 131.; and see as to glass, Burn, J. 2 vol. sect. 5 (6), 122 to 139. 2 Highmore, 110 to 142. Huie, 175 to 216.

(3) See Huie, 236. Highmore, Hops.

(4) 7 Geo. 2. c. 19. s. 2.

(5) The King v. Pack, 6 T. R. 374. Conviction affirmed.

(6) The King v. Pack, 6 T. R. 374.; and see as to hops, Burn, J. vol. 2. sect. 5 (7), 139 to 143. 2 Highmore, 158 to 174. Huie, 236 to 244.

(7) 48 Geo. 3. c. 60. s. 7. A penalty of £100 is added by 52 Geo. 3. c. 94. s. 7.

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of the statute 1 Jac. 1., but only a retail dealer in leather; whereas the statute means an artificer of some distinct trade, as a shoemaker or sadler, in the exercise of which the cutting of leather is used (1); and it seems that in an information under this statute, it is not sufficient to describe the defendant as an artificer generally, without stating what species of artificer he is. (2) A condemnation by four out of the six triers of leather appointed under 1 Jac. 1. c. 22. (the whole number being met for the purpose of trying), must be considered as the condemnation of all six. (3) The officers at Leadenhall market, appointed to search and seize leather under the stat. 1 Jac. 1. c. 22., were authorized to seize leather insufficiently dried, in order to carry it before other officers called triers; but they could not seize any leather which was sufficiently dried, though in their judgment it were not so; and if they did, they were liable to an action of trespass. (4) And the section which inflicted the penalty of £5 upon any person resisting the searchers appointed by that act, in searching for and seizing goods made of leather ill tanned or wrought, did not attach upon a tradesman who purchased such goods ready made, though with intent to sell again, but only upon the original makers of such ill-wrought goods. (5) But it was held, that if a person carrying on within the Borough one of the trades mentioned in the 1 Jac. 1. c. 22. viz. that if a cutter and worker of leather expose to sale shoes manufactured without the Borough, and purchased by him ready-made, the searchers may seize them under sect. 32., if made of leather insufficiently tanned. (6) The statute 1 Jac. 1. is now repealed. (7)

Linens, &c.

The excise duties imposed on *linen*, whether printed, painted, stained, or dyed, are payable upon the scenes of theatres, and all other canvas so painted. (8) Canvas is linen within the

(1) The Attorney General v. Dennis, 1 Anst. 166. Huie, 230.

(2) Attorney General v. Dennis, 1 Anst. 166. per Thomson, B.

(3) Grindley and another v. Barker and others, 1 Bos. & Pul. 229. The 1 Jac. 1. c. 22.

(4) Warne v. Varley and others, 6 T. R. 443.

(5) Mason, q. t. v. Middleton, 3 East, 334.

(6) Hodgson v. Rickard and others, 2 New Rep. 389.; and see Shipman q. t. v. Henbest, 4 T. R. 109.

(7) 48 Geo. 3. c. 60. s. 1.; and see as to leather, Burn, J. vol. 2. tit. Excise, sect. 5 (8), 144 to 148.; and see as to leather, hides, skins, parchment, and vellum, 2 Highmore, 175 to 187.; and as to hides, Huie, 216 to 236.

(8) The Attorney General v. Brandon, 3 Price, 360. 10 Ann. c. 19. 24 Geo. 3. c. 41. 25 Geo. 3. c. 72. 43 Geo. 3. c. 69. Burn, J. Excise and Cust. sect. 5 (9).

meaning of the statutes. But where the canvas has been previously primed, it is not liable to any further duty for being afterwards painted, the primer having paid a duty in the first instance in respect of the colour necessarily laid on in that preparatory operation. (1)

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Malt.

The statutes 42 Geo. 3. c. 38. s. 30. and 48 Geo. 3. c. 74. s.13. enacts, that no *maltster* shall wet the grain which he is making into *malt* in any stage of the process after it has been thrown out of the cistern, uting vat, or other steeping utensil, for a period of 12 days, or 288 hours; and if he do so before the expiration of that period, he will forfeit £200 (2). The statute 46 Geo. 3. (3) repealed the provision of the 42 Geo. 3., and enacted, that the corn in that state should not be wetted till nine days, &c. after the 1st of August 1806; and sect. 14. provided, that the act should commence and take effect, as to all matters not specially provided for, from the 1st of August 1806, and continue in force till the 25th March 1807. On the construction of these clauses it was holden, that incorporating the 14th with the 1st section, the 46 Geo. 3. only operated as a repeal of the 42 Geo. 3. during the time limited in the 14th section, after which the first statute resumed its operation in the interval between the 25th of March 1807, and a subsequent act reviving and continuing the 46 Geo. 3. (4) Several instances have occurred, in which the commissioners of excise have instituted proceedings by inquisition and scire facias, for arrears against such maltsters as had accounted for the duties on malt made by them according to a calculation of the barley requiring to be longer than sixteen days in operation during its progress through the house (that is) in passing the several floors from the cistern to the kiln. And it has been decided, that proof of malt not having required so long a space of time in working and passing through the floors from the cistern to the kiln, as it had been entered as having taken for that purpose, will in some cases be considered prima facie evidence of fraud, and duties are recoverable for the amount of so

(1) The Attorney General v. Brandon, 3 Price, 360.; and see as to linen cloth, silks, cottons, and calicoes, Burn, J. vol. 2. tit. Excise, sect. 5 (9), 148 to 156. 2 Highmore, 188 to 212. Huie, 572 to 583.; and see also as to cambricks and lawns, Huie, 76 to 79.

(2) 42 G. 3. c. 38. s. 30, 31. 48 G. 3. c. 74. s. 13.; and penalty on workmen, s. 14.

(3) 46 Geo. 3. c. 139. s. 1.

(4) The King v. Rogers, 10 East, 569.

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much grain malted, as would be commensurate with such excess of time as if so much of the duty were in arrear (1). The average number of days necessary for working the grain intended for malt between the steeping and drying, is computed by the excise at sixteen (2); and excise books transcribed from the maltster's specimen paper, are admissible evidence against him, without calling the officers to substantiate them (3). The statute 12 Ann. c. 2. limited prosecutions for the malt duty to five years, enacting, that no person should be sued for or charged with the duties granted by the act, unless some action or information was commenced within five years after they became due (4). But in a late case, which was determined, after a laborious investigation and comparison of the different malt acts, which being in pari materiæ, must be construed together, it was holden, that the limitation clause of the statute of Anne was not now in force, there being nothing in the existing laws which can be construed as an adoption of that part of the statute, which binds the crown to proceed within a determinate period (5). The statute of Anne is frequently referred to by the succeeding acts, and many of the provisions of it are re-enacted, some with and some without alteration, but not the clause with respect to the limitation of time; and the reference appears to have no other effect but to continue to the crown the powers and authorities given by the act, for the recovery of penalties and duties (6). The statute 48 Geo. 3. c. 74. gives a summary form for a conviction before justices of the peace for penalties or forfeitures under the acts of parliament relating to the duties on malt (7); and the 22d section enables the party aggrieved to appeal to the quarter sessions, and the sessions may amend defects in form; and no certiorari can be brought to reverse their determination; but the sessions may rehear the case, examining only the same witnesses as were produced before the magistrates (8). Previously to this statute, it was holden by the

Conviction before justices.

(1) The King v. Grimwood, 1 Price, 369.

(2) Id. ibid.

(3) Id. ibid.

(4) 12 Ann. sess. 1. c. 2. s.19.

(5) Attorney General v. Newman, 1 Price, 438.

(6) Attorney General v. Newman, 1 Price, 446.

(7) 48 Geo. 3. c. 74. s. 22.

(8) 48 Geo. 3. c. 74. s. 15.; and see as to malt, Burn, J. tit. Excise, vol 2. sect. 5 (10), 156 to 173. 2 Highmore, 213 to 234. Huie, to ; and see also as to paper, Burn J. vol. 2. tit. Excise, sect. 5 (11), 174 to 188.; and as to paper and pasteboard, see 2 Highmore, 237 to 261. Huie, 324 to 355. See also as to plate, Burn, J. tit. Excise, sect. 5. (12), 189 to 191. 2 Highmore, 143 to 152. Huie, 360 to 362.; and as to salt, Burn, J. tit. Excise, sect. 5 (13), 191 to 215. Huie, 459 to 571.

court of king's bench, that no appeal could be made to the sessions from a conviction by two justices, on the stat. 42 Geo. 3. c. 38. s 30. for wetting corn in a certain stage of the process of malting (1). With respect to the conviction upon the stat. 42 Geo. 3., it is to be observed, that it is a general rule, that where a penalty is to be sued for before justice of the peace, within a certain time after the commission of the offence, it is necessary that the evidence stated in the conviction should set forth the date of the fact with precision, either by positive averment, or by express reference to a date previously mentioned. Therefore, where a conviction on this statute alleged that an information was exhibited on the 29th of May 1805, charging, that the defendant within three months last past, did wet certain corn, &c. and the evidence stated was, that witness, on the 22d of May, without mentioning the year, found a floor of malt there, in the operation, &c. (so proceeding to state the fact of the offence), the conviction was quashed on account of the defective manner in which the date was alleged in evidence (2). But in stating the evidence, it is sufficient to refer to a date that has been previously mentioned, without re-stating it. Thus, where a conviction was dated the 4th of June, and the information which was exhibited the 29th of May, charged the offence within three months last past, viz. on the 12th of May last past; and the fact was sworn to in the evidence as having happened on the said 12th of May, the conviction was holden good (3). Further, in the statement of the evidence in a conviction, no material omission with regard to the description of the defendants in those particulars which are necessary to constitute the offence, can be supplied by intendment; but this rule is to be understood with some qualification in favour of what is necessarily and plainly to be collected from the facts stated, although it is not expressly averred. Thus, in a conviction on the malt act, 42 Geo. 3. the offence, which was that of wetting malt, was laid on the 12th of May; and the witness, an excise officer, after stating that the defendant was a maltster, (an allegation which must refer to the day of the conviction, and not to the day laid for the offence) proceeded to state, "that he surveyed the malt house of the said defendant on the said 12th day of May, and found a floor of malt in operation." A doubt was suggested, whether the evidence sufficiently showed

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(1) The King v. Skone, 6 East, 514.

(2) The King v. Woodcock, 7 East, 146.

(3) The King v. Crisp, 7 East, 389.

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the defendant to have been a maltster at the time of the offence committed. It was argued for the affirmative, first, that it was sufficiently alleged by reference to the information, the witness having spoken of the said defendant who had been sufficiently described in the information; the court however, did not concur in this argument. It was therefore further contended, that the fact of the defendant being a maltster at the time of the offence, viz. 12th of May, must necessarily be collected from the whole of the evidence; and the majority of the court were of that opinion. Lord Ellenborough said, "If any material fact were wanting in the evidence to make out the charge, I should be very unwilling to supply it by intendment; but taking the whole evidence together, it does sufficiently appear that the defendant was a maltster at the time of the offence committed. All the difficulty arises from the order in which the evidence was taken down. The witness begins by stating, that the defendant is a maltster, which would refer to the time he is speaking, the 4th of June. But without adverting to that, the evidence appears to me to be sufficient. The witness deposed, that on the 12th of May he surveyed the malthouse of the defendant. Now it could not then be the defendant's malthouse, nor could the officer then have surveyed it, unless the defendant had entered the malthouse as a maltster, it would otherwise have been miscalled the defendant's malthouse. The term survey too is used in malt acts; and I believe the officer has no authority to survey a malthouse, unless it be entered as such." And the court concurred in this opinion, though Mr. J. Lawrence doubted. A return of duty is frequently demandable on the destruction of exciseable goods, as by the malt act 9 Geo. 1. c. 3. which authorizes a return of duties paid for malt on its being destroyed by fire, by the burning of the place of deposit, &c. on notice being given, and proof made to the commissioners of excise, &c. who are to grant a certificate for the purpose (1). A quantity of malt belonging to Mr. Calvert, which had paid the duty, having been afterwards burnt, the insurers moved the court of K. B. for a writ of mandamus to the officer of excise, to compel him to give a certificate to entitle them to a return of duty, as being within the jurisdiction of that court, to compel a public officer to do a ministerial act; but it is said, that the court of

Malt, return of duty.

(1) See the regulations, 9 Geo. 1. c. 3. s. 35, 6. Burn, J. Excise, sect. 5 (10). Huie and Highmore; and as to overcharge, see 4 & 5 W. & M. sess. 1. c. 24. s. 13. which is general, ante; tit. Spirits.

K. B. refused the application as being properly cognizable in the court of exchequer, and that a motion was made afterwards in the court of exchequer, and an order obtained to compel the officer to grant a certificate. (1)

II. The Excise Duties.

Plate Licence.

A dealer in *gold or silver plate* is obliged to take out a licence, for which he pays an annual duty of £4 12s. or £11 10s., according to the quantity of gold or silver which is introduced into any particular article of his trade. (2) The statute describes the

(1) Ex parte Mr. Calvert, 1 Anst. 270.; but Court of Exchequer will not grant order on nice point of law, on motion, id. ibid. The statutes respecting the malt duty, as arranged by the writers upon this branch of the excise law, regulate the amount of duty, see 60 Geo. 3. and the annual malt act. The entry of utensils and places, 12 Ann. sess. 1. c. 2. s. 36. 48 Geo. 3. c 74. s. 18. 49 Geo. 3. c. 81. s. 8. Huie, 275. The taking out licences, 24 Geo. 3. sess 2. c. 41. s. 1, 6, 7. Huie, 276. The construction of cisterns, 52 Geo. 3. c. 128. s. 1. 53 Geo. 3. c. 9. s. 3. Huie, 276. The notice before wetting, 3 Geo. 3. c. 13. s. 1. Huie, 276. The hours of beginning to wet, 42 Geo. 3. c. 38. s. 28. 53 Geo. 3. c. 9. s. 2. Huie, 277. The time the grain must be covered with water, and adding fresh grain after account taken, 42 Geo 3. c. 38. s. 32. 52 Geo. 3. c. 128. s. 6. 53 Geo. 3. c. 9. s. 1 & 2. Huie, 277. The taking grain from the cistern, 52 Geo. 3. c. 128. s. 4 & 5. Huie, 278. The number and lay of floors, 52 Geo. 3. c. 128. s. 2 & 3. Huie, 278. The power of officers to enter and take account, 12 Ann. sess. 1. c. 2. s. 4 & 34. 42 Geo. 3. c. 38. s. 34. Huie, 278, 9. The accounts which are to be by gauge only, and allowances, 8 & 9 W. 3. c. 22. 12 Ann. sess. 1. c. 2. s. 7. 50 Geo. 3. c. 34. s. 4. 12 Ann. sess. 1. c. 2. s. 17 & 7. 50 Geo. 3. c. 34. s. 4. 12 Ann. sess. 1. c. 2. s. 20 & 28. 42 Geo. 3. c. 28. s. 29. 33 Geo. 2. c. 7. s. 59. 42 Geo. 3. c. 38. s. 32. The officers return, 12 Ann. sess. 1. c. 2. s. 4 & 31. The pressing in cistern or couch, 48 Geo. 3. c. 74. s. 19. 41 Geo. 3. c. 91. s. 1. 48 Geo. 3. c. 74. s. 19. The wetting grain after taking from cistern, &c., 42 Geo. 3. c. 38. s. 30 & 31. 48 Geo. 3. c. 74. s. 13 & 14. The concealing, &c. of malt, 48 Geo. 3. c. 74. s. 17. 42 Geo. 3. c. 93. s. 17. 48 Geo. 3. c. 74. s. 20. 52 Geo. 3. c. 128. s. 7 1 Geo. 1. sess. 2. c. 2. s. 13. The penalty on maltster's servants wetting or removing grain contrary to law, by stat. 42 Geo. 3. c. 38. s. 33. The account which the makers of malt must keep of the barley, according to 48 Geo. 3. c. 74. The permits for malt in the highlands of Scotland, 46 Geo. 3. c. 102. s. 36. The entry of malt, and payment of the duty, 12 Ann. sess. 1. c. 2. s. 4, 5, 6. 1 Geo. 1. sess. 2. c. 2. s. 8. 48 Geo. 3. c. 74. s. 16. 23. And the relief for malt destroyed or damaged, 9 Geo. 1. c. 3. s. 35, 6, 7. and see as to malt in general, Huie, 273 to 296.

(2) 43 Geo. 3. c. 69. Schedule A., title Licence 55 Geo. 3. c. 50.; but latter act only in force till 5th April 1819; and see Burn, J. Excise, sect. 5 (12), Plate. Huie on Excise, 360 to 362; and as to taking out licences, 31 Geo. 2. c. 32. s. 3, 4. 6. 10. 32 Geo. 2. c. 24. s. 1. to 5. 31 Geo. 2. c. 32. s. 7. 32 Geo. 2. c. 24. s. 7. 53 Geo. 3. c. 103.; and as to recovering, &c. penalties, 31 Geo. 2. c. 32. s. 11, which has been continued by other acts.

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persons who are to take out licences as persons using the trade of selling gold or silver plate, or any goods or wares composed of gold or silver, or in which any gold or silver shall be manufactured, and persons employed to sell any gold or silver plate, or any such goods or wares as aforesaid, at any auction or public sale or by commission. But a person who sold one piece of old plate to an innkeeper at a price set upon it by a silversmith, as what it was worth for use, was held not to be liable to a penalty for selling plate without taking out a licence, this being only a singular and isolated instance. (1)

Soap.

The duties on *soap* are imposed by the statutes 43 Geo. 3. c. 69. 39 & 40 Geo. 3. c. 67. 55 Geo. 3. c. 30. (2) 56 Geo. 3. c. 44.; and heavy penalties are inflicted on the fraudulent concealment of the article. The statute 1 Geo. 1. st. 2. c. 36. enacts, that if any maker shall fraudulently conceal soap chargeable with duty under the statutes of Anne, or any of the materials for making it, with intent to defraud his majesty, he shall forfeit £500, besides the article concealed. (3) An offence may be committed against this statute by fraudulently concealing soap, even in an entered place, and by mixing it with other soap, although the act be done with the privity of the inferior attending officer (4); but the statute only authorized the levying of a penalty on the soap and the materials for making it, and therefore a warrant of the commissioners of excise, made in general terms, for levying on the goods of the offender, was holden to be bad (5); and it has been doubted whether the soap and materials for making it, which were the property of the bankrupt, can be seized in the hands of his assignee, for penalties incurred under the excise laws previously to the bankruptcy, although they may be seized under such circumstances for duties due before the bankruptcy. (6)

(1) The King v. Buckle, 4 East, 346.; and as to what is to be considered a *dealing*, see Johnson v. Hudson, 11 East, 180. The King v. the Commissioners of Excise, 2 T. R. 386, &c. Rex v. Little, 1 Burr. 609. Paley on Com. 71. Boscawen, 130.

(2) 55 Geo. 3. c. 30., until 5th April 1819. Entry must be made of places and utensils, 10 Ann. c. 19. s. 6. 47 Geo. 3. sess. 2. c. 30. s. 6.; also a licence by maker, 24 Geo. 3. sess. 3. c. 41. s. 1. 6, 7. Power of officers to enter, 10 Ann. c. 19. s. 12. 17 Geo. 3. c. 52. s. 9. 24 Geo. 3. sess. 2. c. 48. s. 11.

(3) 1 Geo. 1. st. 2. c. 36. s. 14.

(4) The Attorney General v. Brewster & Norton, 2 Anstr. 560.

(5) Austin v. Whitehead, 6 T. R. 438. Vide as to levying, 10 Ann. c. 19. s. 20. 28 Geo. 3. c. 37. s. 21.

(6) Austin v. Whitehead, 6 T. R. 436. Stracy v. Hulse, Dougl. 411.

The duties imposed upon "every gallon of wort or wash brewed or made for extracting spirits for home consumption in England from malt, corn, grain, or tilts, or any mixture therewith," have been holden to attach upon the *wash* before distillation (1). In the case in which this point was determined, a quantity of wash had been put into the still after it had been gauged; but the still burst, and the wash was lost. The court observed, that it was a very general rule, in making the revenue laws, to avoid providing for contingencies of this kind, but that relief would be obtained on a proper application to the treasury (2). The stat. 1 W. & M. indeed provides, that the commissioners of excise or of appeal, or the justices of the peace within whose jurisdiction the makers or retailers of excisable commodities live, on complaint of any overcharge returned upon them by the gauger, shall hear and determine such complaints, and examine the witnesses of both parties upon oath; and thereupon, or by any other proof, acquit them of so much as is made out to be an overcharge (3). But this provision only authorizes magistrates to relieve against a charge which is excessive at the time it is made, and does not extend to protect the distiller from an accident which happens to the article after the duty has been regularly assessed upon it. (4)

II. The Excise Duties. Spirits.

The duties on *vinegar* are imposed at the rate of one shilling for every gallon wine measure of vinegar or acetous acid or liquors prepared or preparing for vinegar or acetous acid, im-

Vinegar.

See 28 Geo. 3. c. 37. s. 21.; and see as to soap, 2 Burn, J. tit. Excise, sect. 5 (14), 216 to 227. 2 Highmore, 262 to 277. Huie, 583 to 600. 59 Geo. 3. c. 90.

(1) The Attorney General v. ——————, 2 Anstruther, 558. decided on 26 Geo. 3. c. 73., misprinted 24 Geo. 3.; see next note.

(2) 2 Anstr. 560. See as to the existing duties, 43 Geo. 3. c. 60. 43 Geo. 3. c. 81. 51 Geo. 3. c. 59. 51 Geo. 3. c. 111. 54 Geo. 3. c. 71.

(3) 1 W. & M. sess. 1. c. 24. s. 13. Brewer, maker, or retailer, &c. vide next note.

(4) The King v. Sikes, 7 T. R. 56., decided on 26 Geo. 3. c. 73.; and see as to spirits, Burn, J. tit. Excise, sect. 5 (15), 2 vol. 227 to 281. 2 Highmore, 278 to 413. Huie, 600 to 712.; and see as to starch, hair-powder, and stone-blue, Burn, J. tit. Excise, sect. 5 (16), vol. 2. 281 to 292. 2 Highmore, 414 to 441. Huie, 713 to 729.; and as to sweets or made wines, Burn, J. tit. Excise, sect. 5 (17), vol. 2. 292 to 295. 2 Highmore, 442 to 446. Huie, 736 to 741.; see also as to tobacco and snuff, Burn, J. tit. Excise, sect. 5 (18), 225 to 308. 2 Highmore, 489 to 556. Huie, 741 to 789.; see also as to wine, Burn, J. tit. Excise, sect. 5 (20), vol. 2. 310 to 319. 2 Highmore, 562 to 612. Huie, 839 to 865.; see also as to wire, Burn, J. tit. Excise, sect. 5 (21), vol. 2. 320 to 322. 2 Highmore, 152 to 157. Huie, 865, 869.; and see also as to wool, Huie, 870 to 880. See consolidation act, 59 Geo. 3. c. 53, 75, 106, 114.

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ported into Great Britain from foreign parts, to be paid by the importer; of four-pence for every gallon wine measure of vinegar, or acetous acid, or liquors prepared or preparing for vinegar or acetous acid, brewed or made in Ireland, and imported from thence into Great Britain, to be paid by the importer, and the like sum for every gallon wine measure, of vinegar or acetous acid, or liquors prepared or preparing for vinegar, or acetous acid, brewed or made in Great Britain for sale, to be paid by the maker (1). A blacking manufacturer who made, and used in the making of blacking, a liquid, sometimes called sugar-water, and sometimes cooperwash, which was in point of fact vinegar, or at least a preparation for vinegar, mixed however with oil, and lamp or ivory black, and other ingredients, calculated to make blacking, was held liable to pay the excise duties as upon vinegar made for sale (2). And vinegar made and used in preparing or making pickles for sale, is liable to duty; but vinegar used in making and preparing white lead (3), as well as under certain circumstances, acetous acid, commonly called pyroligneous acid, is excepted from the general operation of the duty on vinegar. (4)

Secondly, Provisions of a general nature relating to Licences, &c. (5)

Of Licences.

Secondly, we have to consider the provisions of a *general nature* that relate to licences, permits, &c. The requiring a *licence* to be taken out *by the dealer in excisable articles*, is an expedient very frequently and in general advantageously resorted to for assuring a performance of the laws relating to the revenue. The annual licence granted under the stat. 5 & 6 Edw. 6. c. 25. 26 Geo. 2. c. 31. 32 Geo. 3. c. 59. and other statutes, at a general meeting of the justices of the division for keeping an alehouse or a victualling house, or for selling ale, beer, and other liquors by retail, is required to be taken out principally for purposes of a political nature, which it is not necessary in this place to consider (6). But an *excise*

(1) 58 Geo. 3. c. 65.

(2) The Attorney General v. Green, 4 Price, 224.; and said to have been held not necessary to *state* in the information that the liquor was preparing for vinegar for sale, in prosecution for condemnation on 42 Geo. 3. c. 93. s. 17. of goods seized in unentered place. Id. ibid.

(3) 8 Ann. c. 7. s. 5.

(4) 58 Geo. 3. c. 65. s. 6.; see also as to what is deemed vinegar, 10 & 11 W. 3. c. 21. s. 11. 58 Geo. 3. c. 65. s. 6 & 24. Huie, 796.; see also in general as to the excise on vinegar, Burn, J. Excise, sect. 5 (19), 2 vol. 308. 310. 2 Highmore, 557 to 561. Huie, 794. 805.

(5) See division of the subject, ante, 818.

(6) 26 Geo. 2. c. 31. s. 1 to 8, 12. 15, 16. 32 Geo. 3. c. 59. s. 1 to 8. 29 Geo. 3. c. 31. s. 3. 38 Geo. 3. c. 54. s. 13. 35 Geo. 3, c. 113. s. 7. 9. and 17. 39 Geo. 3, c. 86. s. 3. 48 Geo. 3. c. 143, sec. 2 to 7.

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licence must also be taken out by every person who sells beer or ale by retail, or who sells cider or perry to be consumed in his own house or premises, and this licence, if taken out in London, is under the hands and seals of two of the commissioners of excise, or of such person as they appoint, or if taken out in any other part of England, it is under the hands and seals of the collector and supervisor of the district (1). And the duty is paid either at the chief office or to the collector, and the licence whenever granted continues in force till the following 10th Oct. (2). It must be renewed from year to year within ten days after the expiration of a former one, otherwise a penalty of £50 will attach (3). An allowance, however, must be granted by the magistrates before the excise licence can be issued (4). The licences are in themselves a very productive source of revenue. The general licensing acts are the 24 Geo. 3. c. 41. which is entitled An act for laying duties on licences to be taken out by the makers and dealers in respect of the excisable articles therein mentioned, and the 59 Geo. 3. c. 106. A common brewer (5), a distiller (6), a brandy dealer (7), a maker of mead (8), or of

(1) 48 Geo. 3. c. 143. s. 2. So in Scotland, the commissioner of excise; in Edinburgh, or otherwise, collector and supervisor.

(2) 48 Geo. 3. c. 143. If justice's licence is not, as usual, in September, the excise licence is taken within 10 days after, for 12 months.

(3) 48 Geo. 3. c. 143. s. 5. How executors and assignees to have the benefit, 53 Geo. 3. c. 103. s. 6. One licence sufficient for a firm of many persons in one house.

(4) 48 Geo. 3. c. 143. s 7. See as to licences for canteens, 55 Geo. 3. c. 17. s. 49., mutiny act.

(5) 24 Geo 3. sess 2. c. 41. s. 1. 6 to 8. 53 Geo. 3. c. 103. 48 Geo. 3. c. 143. s. 2 & 5. 56 Geo. 3. c. 113.

(6) 43 Geo. 3. c. 69. 55 Geo. 3. c. 30. 58 Geo. 3. c. 50. 56 Geo. 3. c. 113. 58 Geo. 3. c. 13. 24 Geo. 3. sess. 2. c. 41. s. 1. 6 to 8. 53 Geo. 3. c. 103. N. B. The stat. 43 Geo. 3. c. 81. & 47 Geo. 3. c. 27. to be in force for 12 months after peace; but continued till 5th July 1821 by 56 Geo. 3. c. 17. Three fourths of the duties by 54 Geo. 3. c. 172. perpetual, and other part continued by 56 Geo. 3. c. 106. till Nov. 9, 1816. The duties by 55 Geo. 3. c. 30. to continue till April 5th, 1819, further continued until 5th July A.D. 1822, by 59 Geo. 3. c. 32. Those by 58 Geo. 3. c. 50. till Nov. 10th, 1820. Those by 56 Geo. 3. c. 105. continued by 58 Geo. 3. c. 26. till July 5th, 1819. The duty by 51 Geo. 3. c. 39. on foreign spirits, is £12 10s. per cent. on the amount of former duties. Huie. 604, 5.

(7) 24 Geo. 3. sess. 2. c. 41. s. 1. 6 to 8. As to dealers in spirits, and as to dealers in foreign wine, 26 Geo. 3. c. 59. s. 8 to 11. Toussaint v. Darbon, 1 Taunt. & Broderip, 5. 30 Geo. 3. c. 38. s. 6 to 10. 14, 15, & 18. 53 Geo. 3. c. 103. 32 Geo. 3. c. 59. s. 9. 26 Geo. 3. c. 59. s. 11. 53 Geo. 3. c. 17.

(8) £1 by 43 Geo. 3. c. 69. Additional £1 by 53 Geo. 3. c. 30. 53 Geo. 3. c. 103. 24 Geo. 3. sess. 2. c. 41. s. 1. 6 to 8. The duties by 43 Geo. 3. perpetual; those by 55 Geo. 3. to continue till April 5th, 1819.

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sweets (1), or of vinegar (2) for sale, a maltster (3), a candle-maker (4), a soap-maker (5), a paper stainer (6), a calico printer (7), a starch maker (8), a wire drawer (9), a tanner (10), a tawer (11), a dresser of hides (12), a currier (13), a vellum maker (14), a glass maker (15), and makers and sellers

(7) £5 by 43 Geo. 3. c. 69.; and additional £5 by 55 Geo. 3. c. 30. 24 Geo. 3. sess. 2. c. 41. s. 1. 6 to 8. 30 Geo. 3. c. 38. s. 6. 9. 26 Geo. 3. c. 74. s. 7. 10 Geo. 2. c. 17. s. 10, 11. 28 Geo. 3. c. 37. s. 32. 32 Geo. 3. c. 59. s. 9. 11. 26 Geo. 3. c. 74. s. 7.

(2) £10 by 43 Geo. 3. c. 69.; and additional £10 by 55 Geo. 3. c. 30. till April 5th, 1819. 24 G. 3. sess. 2. c. 41. s. 1. 6 to 8. 53 Geo. 3. c. 103.

(3) Amount of licence varies according to the quantity of malt sold, 43 Geo. 3. c. 69. 55 Geo. 3. c. 30. 24 Geo 3. sess. 2. c. 41. s. 1. 6 to 8. 53 Geo. 3. c. 103.

(4) 43 Geo. 3. c. 69. 55 Geo. 3. c. 30. 24 Geo. 3. sess. 2. c. 41. s. 1. 6 to 8. 24 Geo. 3. sess. 2. c. 36. s. 9. 11 to 14. 53 Geo. 3. c. 103. The stat. 55 Geo. 3. c. 30. to continue in force till April 5th, 1819.

(5) £2 by 43 Geo. 3. c. 69.; and additional £2 by 55 Geo. 3. c. 30. till 5th of April 1819. 24 Geo. 3. sess. 2. c. 41. s. 1. 6 to 8. 53 Geo. 3. c. 103.

(6) £2 by 43 Geo. 3. c. 69.; and additional £2 by 55 Geo. 3. c. 30. till April 5th, 1819. 24 G. 3. sess. 2. c. 41. s. 1. 6 to 8. 53 Geo. 3. c. 103.

(7) £10 by 43 Geo. 3. c. 69.; and additional £10 by 55 Geo. 3. c. 30. till April 5th, 1819. 24 Geo. 3. sess. 2. c. 41. s. 1. 6 to 8. 49 Geo. 3. c. 81. s. 2. 53 Geo. 3. c. 103.

(8) £5 by 43 Geo. 3. c. 69.; and additional £10 by 55 Geo. 3. c. 30. until April 5th, 1819. 24 Geo. 3. sess. 2. c. 41. s. 1. 6 to 8. 53 Geo. 3. c. 103. 42 Geo. 3. c. 93. s. 13.

(9) £2 by 43 Geo. 3. c. 69.; and additional £2 by 55 Geo. 3. c. 30. till April 5th, 1819. 24 Geo. 3. sess. 2. c. 41. s. 1. 6 to 8. 53 Geo. 3. c. 103. 31 Geo. 3. c. 32. s. 10.

(10) £5 by 43 Geo. 3. c. 69.; and additional £5 by 55 Geo. 3. c. 30. till April 5th, 1819, for every tanner within the bills of mortality. £2 10s. by 43 Geo. 3. c. 69.; and additional £2 10s. by 55 Geo. 3. c. 30. till April 5th, 1819. 24 Geo. 3 sess. 2. c. 41. s. 1. 6 to 8. 53 Geo. 3. c. 103.

(11) £1 by 43 Geo. 3. c. 69.; and additional £1 by 55 Geo. 3. c. 30. till April 5th, 1819. 24 Geo. 3. sess. 2. c. 41. s. 1. 6 to 8. 53 Geo. 3. c. 103.

(12) £2 by 43 Geo. 3. c. 69.: and additional £2 by 55 Geo. 3. c. 30. till April 5th, 1819. 24 Geo. 3. sess. 2. c. 41. s. 1. 6 to 8. 53 Geo. 3. c. 103.

(13) £2 by 43 Geo. 3. c. 69.; and additional £2 by 55 Geo. 3. c. 30. till April 5th, 1819. 24 Geo. 3. sess. 2. c. 41. s. 1. 6 to 8. 53 Geo. 3. c. 103.

(14) £1 by 43 Geo. 3. c. 69.; and additional £1 by 55 Geo. 3. c. 30. till April 5th, 1819. 24 Geo. 3. sess. 2. c. 41. s. 1. 6 to 8. 53 Geo. 3. c. 103.

(15) £10 by 43 Geo. 3. c. 69.; and additional £10 by 55 Geo. 3. c. 30. till April 5th, 1819, for each glass-house. £100 by 51 Geo. 3. c. 69. for each lear, besides the former licence by the makers of phial glass. 24 Geo. 3. sess. 2. c. 41. s. 1. 6 to 8. 51 Geo. 3. c. 69. s. 6 to 10. 53 Geo. 3. c. 103. 58 Geo. 3. c. 33. s. 2.

of tobacco (1), must under this statute be licensed (2); and no person can make any of the commodities therein mentioned for sale, without taking out a licence for that purpose; nor deal in brandy, not being a retailer, rectifier, or distiller, without licence (3); and a person whose trade requires a licence, must take out a new one ten days at least before the expiration of twelve calendar months after he obtained his former licence, under a specific penalty, amounting in the instance of a corn distiller to £200 (4). A firm consisting of several persons carrying on business in one house, requires but one licence (5). The stat. 59 Geo. 3. c. 53. provided that after the 5th of July 1819, every person duly licensed to deal in coffee, should be authorized to deal in pepper by virtue of the same licence; and that if any person should have or receive for sale, or deal in, retail, or sell any pepper, except cayenne, long pepper, or guinea pepper, without having a licence to deal in coffee, he should forfeit £50 (6). When an action was brought against a wine cooper who had been hired to remove wine from one house to another, and had substituted goods of an inferior quality for those which had been entrusted to his care, it was held necessary for the defendant, in order to show that the transaction was illegal, on account of the plaintiff's not having obtained a licence, to prove that the wine was removed for the purposes of sale, because the wine might have been removed as a gift, and the transactions would in that case have been lawful. (7)

II. The Excise Duties.

Entry.

Somewhat similar in its nature and operation to the licence, is the *entry* to be made, and the notice which is to be given at the proper office by the dealers in excisable articles, as the notice

(1) £2 by 43 Geo. 3. c. 69.; and additional £1 by 55 Geo. 3. c. 30. till April 5th, 1819, for every maker. 5s. by 43 Geo. 3. c. 69.; and additional 5s. by 55 Geo. 3. c. 30. till April 5th, 1819, for every dealer within the limits of the excise offices in London and Edinburgh. 2s. 6d. by 43 Geo. 3. s. 69; and additional 2s. 6d. by 55 Geo. 3. c. 30. till April, 1819, for every other dealer. 29 Geo. 3. c. 68. s. 70, 71. 35 Geo. 3. c. 31. s. 4. 29 Geo. 3. c. 68. s. 72 to 76. 53 Geo. 3. c. 103.

(2) 24 Geo. 3. c. 41. s. 1 to 5.

(3) 24 Geo. 3. c. 41. s. 6.

(4) 24 Geo. 3. c. 41. s. 7.

(5) 24 Geo. 3. c. 41. s. 8. Duties under commissioners of excise, s. 9. The powers of 12 Car. 2. c. 4. and other excise statutes are continued by 24 Geo. 3. c. 41. s. 10. Limitation three months, general issue, and treble costs, s. 13. Officers of excise may transfer licences to executors, 53 Geo. 3. c. 103.

(6) 59 Geo. 3. c. 53. s. 20.

(7) Toussaint v. Darbon, 1 Taunt. and Brod. 5. 26 Geo. 3. c. 59. s. 8 to 11, ante, 837. n. 7. See further regulations as to licences by 59 Geo. 3. c. 106.

II. The Excise Duties.

to brewers, &c. on erecting their utensils (1). The entry which the dealers in table beer must make of their cellars (2); the entry of the workhouses for making bricks and tiles (3); the entry of places and utensils for the manufacture of candles (4); the entry by the dealers in coffee, tea, and chocolate (5); the entry by the dealers in cider and perry (6); the entry by the makers of glass of their names, workhouses, and furnaces, &c. (7); also the entry of places for keeping muriate of pot ash (8); the notice by tanners, curriers and leather dressers, and the makers of vellum and parchment, of their names and places of abode, and of the places for tanning or dressing skins, vellum, or parchment (9); the notice by hop growers of their grounds, ousts, &c. and of the time of bagging them, &c. (10); the entry of utensils and places by the makers of malt for sale (11); the entry of places and utensils by the makers of paper, pasteboard, &c. and the printers, painters, or stainers of paper (12); the entry of places and utensils by the makers and refiners of salt, or the proprietors of salt works (13); and the makers of oxygenated muriatic acid, or oxymuriate of lime (14); the entry by printers, painters, stainers, and dyers of silks, callicoes, &c. of their names and places of abode, and the rooms and places where they intend to work or dry them (15); the entry of places and utensils by the makers of soap (16); the entry of places and

(1) 15 Car. 2. c. 11. s. 1. 8 & 9 W. 3. c. 19. s. 8. 5 Geo. 3. c. 43. s. 25. 49 Geo. 3. c. 81. s. 8., &c.

(2) 42 Geo. 3. c. 38. s. 17, 19.

(3) 24 Geo. 3. sess. 2. c. 24. s. 4.

(4) 8 Ann. c. 9. s. 6. 11 Geo. 1. c. 30. s. 23. 25 Geo. 3. c. 74. s. 25. 27 Geo. 3. c. 31. s. 18. 8 Ann. c. 9. s. 17. 49 Geo. 3. c. 81. s. 8.

(5) 10 Geo. 1. c. 10. s. 10 and 14. 12 Geo. 3. c. 46. s. 6.

(6) 3 Geo. 3. c. 1. s. 25. 6 Geo. 3. c. 14. s. 9.

(7) 19 Geo. 2. c. 12. s. 6. 17 Geo. 3. c. 39. s. 27. 35 Geo. 3. c. 114. s. 1. 51 Geo. 3. c. 69. s. 5. 49 Geo. 3. c. 81. s. 8. 58 Geo. 3. c. 21. s. 3. 58 Geo. 3. c. 33. s. 2.

(8) 53 Geo. 3. c. 97. s. 2.

(9) 9 Ann. c. 11. s. 15, 16, and 17. 41 Geo. 3. c. 91. s. 10.

(10) 9 Ann. c. 12. s. 6, 7, 8, 9, and 10. 6 Geo. 1. c. 21. s. 25. 27, and 28. 39 & 40 Geo 3. c. 81. s. 2 and 6. 9 Ann. c. 12. s. 11 and 13. 48 Geo. 3. c. 134. s. 1 and 2. 54 Geo. 3. c. 123. s. 1 and 2. 39 & 40 Geo. 3. c. 81. s. 3, 4, and 7.

(11) 12 Ann. sess. 1. c. 2. s. 36. 48 Geo. 3. c. 74. s. 18. 49 Geo. 3. c. 81. s. 8.

(12) 34 Geo. 3. c. 20. s. 5. 26 Geo. 3. c. 78. s. 16. 12 Ann. c. 19. s. 43, 44, and 45. 49 Geo. 3. c. 81. s. 8. 56 Geo. 3. c. 103. s. 11.

(13) 38 Geo. 3. c. 89. s. 17. 57 Geo. 3. c. 49. s. 11. 49 Geo. 3. c. 81. s. 8.

(14) 55 Geo. 3. c. 66. s. 7 and 8.

(15) 10 Ann. c. 19. s. 71 and 82. 25 Geo. 3. c. 72. s. 7. 14. and 24. 49 Geo. 3. c. 81. s. 8. 58 Geo. 3. c. 65. s. 7.

(16) 47 Geo. 3. sess 2. c. 30. s. 6 and 8. 10 Ann. c. 19. s. 6 and 19. 5 Geo. 3. c. 43. s. 17. 17 Geo. 3. c. 52. s. 1. 49 Geo. 3. c. 81. s. 8.

utensils by distillers and makers of spirits for sale (1); the entry of places and utensils by the makers of starch (2); the like entry by the makers of stone bottles (3); the entry by the makers of sweets or made wines, of their names and places of abode, and of the places and utensils used in making or keeping them (4); the entry which the manufacturers of and dealers in tobacco must make of their warehouses, cellars, &c. (5); the entry of places and utensils by vinegar makers (6); the entry which dealers in and sellers of foreign wine must make of their warehouses and cellars, &c. (7); and the entry which the makers of gold and silver wire must make, of their names and places of abode, and the place where the wire is manufactured (8). II. The Excise Duties.

The statute 18 Geo. 2. c. 26. provides that any entry made of a shop, warehouse, room, place, or utensil to be made use of for carrying on a trade, subject to the survey of the officers of excise, shall not be deemed a legal entry, unless made in the name of the real owner and trader in such shop or place; and the person who shall act as visible owner, or principal manager, shall be deemed the real owner and trader, and be subject and liable as such to all duties, penalties, and forfeitures; and all

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(1) 3 & 4 W. & M. c. 15. s. 1. 8 & 9 W. 3. c. 19. s. 10. 26 Geo. 3. c. 73. s. 3. 35 Geo. 3. c. 89. 24 Geo. 2. c. 40. s. 18. 21 Geo. 3. c. 55. s. 36. The setting up of a private still, or allowing it to be set up in a house, without entry at the excise office, or license, is subject only to the penalty of £20, not £200; and a conviction in the latter penalty was quashed. The King v. Bond, H. T. 1818. 1 B. and A. 390. 26 Geo. 3. c. 73. s. 53. and 3 & 4 W. & M. c. 15. s. 1. Vide also 19 Geo. 3. c. 50. and 23 Geo. 3. c. 70. s. 13., cited in the above case; and in addition to all these provisions, the entry of places for distilling is affected by stat. 58 Geo. 3. c. 65. s. 7. 49 Geo. 3. c. 81. s. 8. 19 Geo. 3. c. 50. s. 3. 23 Geo. 3. c. 70. s. 25. 26 Geo. 3. c. 73. s. 4. 8 & 9 W. 3. c. 19. s. 10.

(2) 10 Ann. c. 26. s. 10. 24 Geo. 3. sess. 2. c. 48. s. 1. 19 Geo. 3. c. 40. s. 1 and 12. 24 Geo. 3. sess 2. c. 48. s. 1. 58 Geo. 3. c. 65. s. 7. 26 Geo. 3. c. 51. s. 20. 49 Geo. 3. c. 81. s. 8.; and as to names over door, see 24 Geo. 3. sess. 2. c. 48. s. 3.

(3) 52 Geo. 3. c. 139. s. 4. and 23. 58 Geo. 3. c. 65. s. 7.

(4) 10 Geo. 2. c. 17. s. 4. 8 & 9 W. 3. c. 21. s. 11. 49 Geo. 3. c. 81. s. 8.

(5) 29 Geo. 3. c. 68. s. 59, 60, 61. 65. 69. 30 Geo. 3. c. 43. s. 7 and 8. 29 Geo. 3. c. 68. s. 96.; and as to name over door, see 29 Geo. 3. c. 68. s. 62 and 63.

(6) 58 Geo. 3. c. 65. s. 15 and 7. 26 Geo. 3. c. 73. s. 56 and 55. 10 & 11 W. 3. c. 21. s. 14.

(7) 58 Geo. 3. c. 65. s. 7. 26 Geo. 3. c. 59. s. 12, 13, and 21.; and as to names over door, see 32 Geo. 2. c. 19. s. 3. 30 Geo. 2. c. 19. s. 2. 26 Geo. 3. c. 59. s. 14 and 15.

(8) 10 Ann. c. 26. s. 49 and 59.

II. The Excise Duties.

goods and utensils found in such shops or places shall be subject to and charged with such duties, penalties, and forfeitures (1). And every person who makes entry, or is required to make entry of any building, place, or utensil, under any law relating to the excise for using the same in carrying on any trade or business subject to the survey of the officers of excise, is required by a late act to distinguish and describe in such entry every such building, place, and utensil, by a particular letter or number, and paint the same in a large and distinct character upon some convenient and conspicuous part of the walls or doors of each building or place, and upon some convenient and conspicuous part of each utensil, and keep the same so painted, and when occasion may require, or when requested by the supervisor of the district, renew the same so long as the entry thereof remains uncancelled (2); and whenever any such person shall use or employ in his entered buildings or places any fixed pipe, he shall at making his entry deliver therewith a drawing or description shewing or explaining the course, direction, construction, and use of such pipe, and every branch thereof, and of every cock thereon, with the places and utensils from and to or with which the same leads or communicates; and if any building, place or utensil, be used without being so described or distinguished, or without such letter or number being so painted and continued thereon, or any pipe be found without being so shewn or described, or different from such drawing or description, every such building, place and utensil, will be deemed unentered, and the person using the same will forfeit besides all other penalties, the sum of £200 (3). An entry of premises for the keeping of beer for sale made by one person in the name of himself and two others, is said to be conclusive evidence against the person making the entry as to his partnership, with the two other persons, in a case where the crown is concerned; but with respect to other persons it is merely prima facie evidence against the person who made the entry. (4)

Dealer's Book.

The dealers in certain excisable articles must also keep an account of their daily sale, and enter it in a *book*, as the dealers in foreign wine are required to do by the stat 26 Geo. 3. c. 59.

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(1) 18 Geo. 2. c. 26. s. 8.
(2) 58 Geo. 3. c. 65. s. 7.
(3) 58 Geo. 3. c. 65. s. 7.
(4) Ellis v. Watson, 2 Stark, 453.

s. 26. and 53 Geo. 3. c. 88. &c. (1); and the books to be kept by the dealers in vinegar or acetous acid, are regulated by the late stat. 58 Geo. 3. c. 65. s. 2. (1) II. The Excise Duties.

Permits.

1. As to Permits in general; in whose Name, and what to be specified therein.

A *permit* is frequently necessary for the *removal* of excisable commodities. With respect to this instrument the statute 11 Geo. 1. c. 30. enacts, that no person shall demand or receive a permit from the officer for the removal of brandy, arrack, rum, spirits, and strong waters, coffee, tea, and cocoa nuts, without the special direction in writing of the person out of whose stock they are to be removed on pain of forfeiting £50; and in default of payment he is to be imprisoned for three months (2). The stat. 21 Geo. 3. also declares, that it is the intention of the several acts of parliament which direct the granting of permits for removing excisable goods, that the officers whose duty it is to give them, should express and limit in the document the time for which it is to be in force for removing the goods from the stock of the person taking it out, as also the time within which it is to be delivered into the stock of the person to whom it is permitted to be sent (3). And if goods liable to excise or inland duties, and required to be removed with permit, are not removed in time; or if they are not removed at all, and the permit is not returned to the officer, the person removing is subject to the penalties of the 11 Geo. 1. (4) And if the goods are removed out of the stock of the person to whom the permit is granted, within the time expressed, but are not delivered in time, the goods will be considered as removed or removing without a permit (5). Provided, however, that if the goods are delayed and prevented from being delivered in time by unavoidable accident or necessity, the court or jurisdiction before which an information is brought for condemnation of the property, may direct it to be restored upon proof of the inevitable accident or necessity by which the delay was occasioned (6). The statutes with respect to the permit for *wine*, require that where a dealer in or seller of foreign wine, duly licensed, has occasion to remove the wine, not exceeding three gallons, the excise officer of the division shall, without fee on a request note delivered by the dealer, grant a permit signed by him expressing the quantity of wine, dis- Permit for Wine.

(1) See Burn J. tit. Excise; Highmore on Excise; and Huie on Excise, under particular articles.

(2) 11 Geo. 1. c. 30. s. 10.

(3) 21 Geo. 3. c. 55. s. 27.

(4) Supra, note 2.

(5) 21 Geo. 3. c. 55. s. 27.

(6) 21 Geo. 3. c. 55. s. 28. Vide Irving v. Wilson, 4 T. R. 485.

(2) 42 Geo. 3. c. 93. s. 16.

II. The Excise Duties.

tinguishing the different species from each other, according to the request note, specifying the names of the seller and buyer, and that the duty has been paid, or that the wine has been condemned, or that it formed part of the stock of some dealer, of which an account has been delivered at the excise office, and the permit must limit the time within which the wine is to be removed out of the seller's stock, and within which it is to be removed into the warehouse of the buyer (1). A similar permit for the removal of foreign wine, may also be granted to any person, though not a dealer or seller, upon the person or his known servant, proving to the satisfaction of the commissioner, or the collector or supervisor of the district, that the duties have been paid, and on a proper request note being delivered to the officer (2). A dealer in wine is not entitled to a permit to remove it when sold if the wine was laid in before he obtained his licence (3). And a person who intends to become a dealer in foreign wine, must take out his licence and make an entry of his warehouse before he lays in his stock; for he becomes a dealer within the meaning of the statute on buying the first parcel of wine with intent to make sale of it again (4). A permit for removing wine from one place to another, under the stat 26 Geo. 3. c. 59. dated nine o'clock in the morning of one day, and giving the party one hour for removing it out of the stock of the vendor, and two days more for delivering it to the purchaser, expires at ten o'clock in the morning of the second day after it is granted (5). And a judgment of condemnation before the commissioners of excise, on an information against a person receiving tea without a permit, has been held to be conclusive evidence of the forfeiture, so as to preclude the person who sent it from maintaining an action of trover against the seizing officer (6). It seems that the court of king's bench

(1) 26 Geo. 3. c. 59. s. 30. as to wholesale dealers; and 42 G. 3. c. 93. s. 6. as to others; and see Huie, 855.; and see what the request note is to specify, s. 31.; and forfeiture and seizure, s. 32.

(2) 26 Geo. 3. c. 59. s. 33. Toussaint v. Barbon. 1 Taunt. and Brod. 5.; and see as to forfeiture of wine, and treble value; and how to save forfeiture on proof of request note delivered in time, see s. 34 to 40, and 40 to 45.

(3) The King v. the Commissioners of Excise, 2 T. R. 381.

(4) Id. ibid.

(5) Cooke v. Sholl, 5 T. R. 255. on trover against seizing officer. There had been judgment of acquittal in exchequer on the information for condemnation, which Lord Kenyon at first thought conclusive (sed quære); but the only point saved was on the construction of the permit. See next note.

(6) Roberts v. Fortune, 1 Harg. L. Tr. 468 n.; but see Henshaw v. Pleasance, 2 Bla. Rep.

will allow a writ of mandamus to be issued to compel the commissioners to grant a permit if they have improperly refused to do so (1). The commissioners of excise provide frames or moulds for making the paper used for permits, with the words excise office visible in the substance of it (2); it is a capital felony to make these frames, or have them in possession without lawful excuse (3), and heavy penalties are imposed by several statutes upon counterfeiting, altering, or misapplying a permit. (4)

II. The Excise Duties.

Thirdly, of the Penalties, Forfeitures, Regulations, &c. (5)

The penalties and forfeitures for breaches of the regulations connected with the excise, together with the powers of seizure and methods of prosecution, have been in part considered in the corresponding divisions of the laws relating to the customs; the regulations of the customs and of the excise duties being very much alike in these respects (6). And there is also an infinite variety of provisions with reference to particular articles, which are now in force, having been at first enacted by the statutes which originally imposed the duty, and since continued down from time to time (7). As a general provision, it is observable, that all goods, in respect of which a duty of excise is imposed, as well as all materials, preparations, utensils, and vessels, in the custody of the makers or manufacturers, or of any person in trust for them, are liable to all duties in arrear from them, and all fines and forfeitures incurred in the course of their trade in respect of goods of a similar nature made or manufactured by them, and may be levied upon, as if the debtors or offenders were the

1178. As to the permit on the removal of tea, coffee, chocolate, &c. see 10 Geo. 1. c. 10. s. 15. 21 Geo. 3. c. 55. s. 27. &c. Huie, 118. 2 Highm. 461.

(1) The King v. the Commissioners of Excise, 2 T. R. 381.

(2) 23 Geo 3. c. 70. s. 8.; and also plates with marks, &c. see the act.

(3) 23 Geo. 3. c. 70. s. 9. 52 Geo. 3. c. 143. s. 9.

(4) 22 Geo. 3. c. 68. s. 26. 23 Geo. 3. c. 70. s. 10. 51 Geo. 3. c. 123. s. 13. See as to permits in general, Huie, 355 to 360: and as to permits on the delivery from the warehouse of coffee, tea, or cocoa-nuts, 43 Geo. 3. c. 29. s. 3.; and the removing of coffee, tea, cocoa-nuts, or chocolate, in any case where above 6 lbs. weight, 10 Geo. 1. c. 10. s. 16., and various other statutes.

(5) See division of the subject, ante, 818.

(6) Ante, 776 to 816. and see 42 Geo. 3. c. 93. s. 18.

(7) See these statutes, Burn J. tit. Excise; Huie on Excise; and as to the particular provisions, The King v. Grimwood, 1 Price, 369., supra, tit. Malt; and The King v. Bond, 1 B. & A. 390. as to the construction of the clauses of reference, and the inconveniences of them. The 59 Geo. 3. c. 53. incorporates the powers of the 12 Car. 2. c. 4. and other statutes, and imposes £200 penalty for obstructing officer.

II. The Excise Duties.

legal proprietors (1). A power is also conferred on the officers to enter the premises of persons who deal in excisable articles, to take accounts and gauge, &c. as with respect to beer (2), bricks and tiles (3), candles (4), cyder and perry (5), glass (6), muriate of pot-ash (7), hides (8), hops (9), malt (10), mead and metheglin (11), paper (12), salt (13), silks, calicoes, linens, and stuffs (14), soap (15), spirits (16), starch (17), sweets (18), tobacco (19), vinegar (20), wine (21), and wire. (22)

A debt due to the crown, compounded of post-horse duties, income tax, stage coach duty, and other assessed taxes, is not a debt of such a nature as will entitle the debtor to the benefit of an extent in aid, for the recovery of it; and it seems that a Baron, who is aware of the nature of the debt, would not grant a fiat; or, if through inadvertence he should, the court will set it aside in a subsequent stage, on the ground of its having been im-

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(1) 28 Geo. 3. c. 37. s. 21.; and see 18 Geo. 2. c. 26. s. 8. 49 Geo. 3. c. 81. s. 8. Austin v. Whitehead, 6 T. R. 436. Ante, 838. as to soap.

(2) 12 Car. 2. c. 23. s. 19. and c. 24. s. 33. 7 & 8 W. 3. c. 30. s. 22. 5 Geo. 3. c. 43. s. 23.

(3) 24 Geo. 3. sess. 2. c. 24. s. 11.

(4) 8 Ann. c. 9. s. 10. 11 Geo. 1. c. 30. s. 24. 24 Geo. 3. sess. 2. c. 11. s. 7. 27 Geo. 3. c. 31. s. 20. 8 Ann. c. 9. s. 12.

(5) 12 Car. 2. c. 23. s. 19. and c. 24. s. 33. 7 & 8 W. 3. c. 30. s. 17. 4 Geo. 1. c. 3. s. 11.

(6) 19 Geo. 2. c. 12. s. 9. 35 Geo. 3. c. 114. s. 2. 26. 49 Geo. 3. c. 63. s. 21. 51 Geo. 3. c. 69. s. 11 and 38.

(7) 53 Geo. 3. c. 97. s. 15.

(8) 9 Ann. c. 11. s. 17 and 16.

(9) 9 Ann. c. 12. s. 15.

(10) 12 Ann. sess. 1. c. 2. s. 4 and 34. 4 Geo. 3. c. 38. s. 34. 12 Geo. 1. c. 4. s. 52.

(11) 12 Car. 2. c. 23. s. 19. and c. 24. s. 33. 7 & 8 W. 3. c. 30. s. 17.

(12) 10 Ann. c. 19. s. 48. 34 Geo. 3. c. 20. s. 18. 10 Ann. c. 19. s. 50. 56 Geo. 3. c. 103. s. 2. 1 Geo. 1. sess. 2. c. 36. s. 17.

(13) 38 Geo. 3. c. 89. s. 18. 122. 125. 139. 57 Geo. 3. c. 49. s. 13. 55 Geo. 3. c. 66. s. 9. 28.

(14) 10 Ann. c. 19. s. 75 and 77.

(15) 10 Ann. c. 19. s. 12. 17 Geo. 3. c. 52. s. 9. 24 Geo. 3. sess. 2. c. 48. s. 7. 10 Ann. c. 19. s. 14. 24 Geo. 3. sess. 2. c. 48. s. 11.

(16) 12 Car. 2. c. 23. s. 19, and c. 24. s. 33. 1 W. & M. sess. 1. c. 24. s. 9. 26 Geo. 3. c. 73. s. 4 and 35. 6 Geo. 1. c. 21. s. 14. 9 Geo. 2. c. 23, s. 9.

(17) 10 Ann. c. 26. s. 14 and 17.

(18) 7 & 8 W. 3. c. 30. s. 17.

(19) 29 Geo. 3. c. 68. s. 97 to 103. 30 Geo. 3. c. 40. s. 20, 21. 29 Geo. 3. c. 68. s. 106, 7, 8. 42 Geo. 3. c. 93. s. 18.

(20) 7 & 8 W. 3. c. 30. s. 17. 58 Geo. 3. c. 65. s. 10.

(21) 26 Geo. 3. c. 59. s. 17 and 18.

(22) 10 Ann. c. 26. s. 52. See also upon this subject, Burn J. tit. Excise, Highmore on Excise, and Huie on Excise, under the titles of the respective articles.

providently issued, without requiring the defendant to plead (1). But it was determined in the court of exchequer, that a common brewer, indebted to the crown for excise duties, is entitled to the benefit of an extent in aid (2). And a paper maker whose occupation renders him liable to duties of excise on the articles which he manufactures, was held to be entitled to an extent in aid, although he gave no bond to the crown (3). But a recent statute which was passed to regulate the issuing of extents in aid, has taken away from debtors of this description, the power of resorting to the prerogative process. (4) II. The Excise Duties.

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(1) The King in aid of Hughes v. Wilton, 2 Price, 368.

(2) The King in aid of Horn v. Rippon, &c. 2 Price, 398.; but see as to surety in maltster's bond, Rex v. Sly, 2 Price, 157; and see infra.

(3) Rex in aid of Magnay and others v. Williams, 3 Price, 75., but see infra.

(4) 57 Geo. 3. c. 117. s. 4.

CORRECTIONS AND ADDITIONS.

Page 10. Insert in line 13. after word "trade," "a trade which ought not to be impeded." 2 Smith W. N. 265. Ed. 1817.

40. At beginning of line 16, insert, "a treaty is a contract superseding the law of nations, therefore" 2 Chalm. Opin. 345.

44. At the end of note 3, add, "and see Marriott's case of Dutch ships, 12, 13."

45. After word "contrary," insert, "and indeed it is the essence of a definitive treaty of peace, that the commercial and friendly intercourse of the contracting powers should be replaced on its former footing." 2 Chalm. Opin. 849.

46. Add to note 1. "as to the duration of a treaty, see Marriott's case of Dutch ships, 12."

47. Add to note 1. "as to ships, Chalm. Opin. 2 vol. index, Treaties."

48. Add to note 1. "And. Hist. Comm. index, tit. Conservator, Consul."

58. At note 1. add, "a consul of a neutral state, resident in enemy's country, and carrying on commerce there, such commerce is liable to seizure by the adverse belligerent, Albretcht v. Sussman, 2 Ves. & B. 323.

66. Add to note 3. "as to power of consul to compel a merchant to accept an office, 2 Chalm. Opin. 294."

129. Note, after words "consequent upon it." insert, "But a natural-born subject of England, naturalized in America, is entitled to trade as an American subject to the East Indies, 8 T. R. 39, 43, 45. See also Reeves, 2 Ed. 328, 330. 37 Geo. 3. c. 97."

156. Add to note 1. "Sir J. Child, 47."

158. Add to note 1. "expediency of allowing export of our own coin, Sir J. Child on Trade, 47, and post 582. and 59 Geo. 3. c. 49."

177. Add to note 3. "ante 160."

181. At line 30, instead of "12 Car. 2. c. 8." read "18."

203. Add to note 2. "quicksilver is also the produce of the Austrian dominions."

211. Add to note 2. "post 467, Montesq. Esp. L. B. 21. c. 17."

327. Line 18, for "north" read "north-east."

368. Bounty on pilchards, note 6, add, "as to bounties on them, 59 Geo. 3. c. 77."

370. Last line, insert, "The Irish fisheries are further regulated by 59 Geo. 3. c. 109."

380. To note 3. add, "Evans v. Richardson, 3 Meriv. 469."

396. As to hostile residence and trading, add, "Albretcht v. Sussman, 2 Ves. & B. 323. Omealey v. Wilson, 1 Camp. 482. Bromley v. Hesseltine, 1 Camp. 75. Tubbs v. Bendelack, 4 Esp. R. 108. 3 Camp. 303."

491. Note 2 instead of "2 East," read "12 East."

507. Note 2. instead of "3 East," read "13 East."

517. In note 4. add, "59 Geo. 3. c. 73."

522. In line 25. instead of "legal," read "illegal."

527. Line 2. the statute Eliz. is repealed by 59 Geo. 3. c. 73.

3 I

Page 560. Lien for freight continues when in East India Docks, 54 Geo. 3. c. 228. § 18.
570. As to importation duties, 59 Geo. 3. c. 15.
582, 3. The exportation of gold and silver legalized by 59 Geo. 3. c. 49.
589. Additional bounty on silk manufactures until 12th July 1819, by 59 Geo. 3. c. 112.
591. Note 2. add, "further bounties granted 59 Geo. 3. c. 112."
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705. Third line from the top, instead of "higher," read "lower."
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720. Line 6. "see 59 Geo. 3. c. 52."
721. Note 4. "as to the ascertaining of the tonnage of steam vessels, see 59 G. 3. c. 5."
741. Note 2. add, "and now by stat. 59 Geo. 3. c. 123. the report is allowed to be amended."
747. Line 8. instead of "and," read "or from being." Line 9. instead of "shipped," read "transferred to another vessel."
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827. At Note 2. "see also 59 Geo. 3. c. 104. and 115."

Page 560. Lien for freight continues when in East India Docks, 54 Geo. 3. c. 228. § 18.
570. As to importation duties, 59 Geo. 3. c. 15.
582, 3. The exportation of gold and silver legalized by 59 Geo. 3. c. 49.
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